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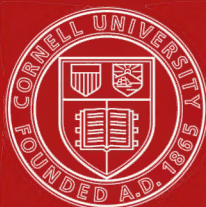
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A TREATISE
ON THE
LAW OF USURY,
PAWNS OR PLEDGES,
AND
MARITIME LOANS.

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Counselor-at-Law,

AUTHOR OF "AMERICAN ECCLESIASTICAL LAW," "COMMENTARIES ON THE LAW OF INFANCY AND COVERTURE," "A TREATISE ON THE REMEDY BY EJECTMENT, AND THE LAW OF ADVERSE ENJOYMENT," ETC., ETC.

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PREFACE.

THE following treatise has been prepared under an impression that a work of the kind was required for the public convenience. The subjects which are treated are regarded with interest in all parts of the American Union. So long as usury laws exist, it is of the utmost importance that they be understood. There is not at present an American work upon usury, in which the general subject is discussed. Mr. Blydenburgh, some thirty years ago, brought out a small work on the law of usury, but he expressly declared that his work was designed only as a supplement to the English works of Powell, Comyn, and Ord; and, since that, two or three other brief essays have appeared, giving the history of usury, or discussing the policy of usury laws, without any attempt to illustrate or explain what the law is. Within the last few years, the statutes of the several States upon the subject of usury have undergone considerable change, and in a few of the States laws against usury have been abolished altogether; and, in the meantime, many decisions have been pronounced by the courts bearing upon the subject. These circumstances, it is believed, have made it the more necessary that a new work should be prepared, showing what the law really is, and where it may be found. Some have supposed that in those States where the effect of usury is not to nullify the contract infected by it, but merely to make it void as to the extra interest, and the like, the subject is of but little or no importance. This is doubtless a mistake. Wherever usury laws exist, in any form, the subject is of importance. To illustrate;

In the State of Pennsylvania, the effect of usury in an instrument is merely to defeat the collection of the usurious interest. In a case, referred to and examined in this work, the plaintiff sought to foreclose a mortgage made to secure \$43,200, with legal interest, and the defense of usury was interposed. The jury found that the amount unpaid on the mortgage was \$42,682.87, but that, in fact, the mortgage was given to secure the payment of a loan at a rate of interest exceeding that established by law, and that, by deducting such excess, the amount actually unpaid was only \$25,799.24. The question was fairly presented and litigated, whether the transaction was usurious or not, and it was found that it was usurious, and the result was that a deduction was made from the face of the mortgage of \$16,883.63; demonstrating the necessity of a knowledge of the principles by which the question of usury is to be determined, even in those States where the effect of the law is simply to deprive the party of the right to collect the excessive interest. The probability is, that but few of the States will very soon try the experiment of doing without laws against usury in some form, and so long as such laws exist, a correct understanding of them is of great importance to the commercial world.

In respect to the contract of pawn or pledge, it may be safely affirmed that few subjects connected with the commerce of the country are of more general importance than the law regulating the subject of pledges or pawns. Every business man has more or less to do with the subject, and yet there is scarcely any commercial subject less generally understood, or less adequately ascertained. Here, again, we are without the aid of a single American work. A few brief paragraphs are devoted to the subject in the excellent treatises of Judge Story and Mr. Edwards on Bailments, but no work has heretofore appeared in which the subject has been specially treated. This want has been seriously felt, and hence the importance of the discussion in this work,

So, also, the subject of maritime loans is of marked interest; especially to the members of the legal profession practicing in the great commercial centers of our country. It is true that the subject has been discussed in works heretofore published; but a considerable time has elapsed since those works first made their appearance, during which many important decisions have been made upon the subject, making it necessary that the whole matter should be newly presented.

I have endeavored in this work to examine, carefully and fully, the several subjects which I have treated, and bring out with clearness and accuracy the law and principles by which they are respectively governed. Part I occupies 446 pages, in which the subject of usury is exhaustively treated, the constituents of usury clearly defined, the statutes in force in the several States relating to interest succinctly stated, and the principal authorities upon the subject, both in England and this country, thoroughly considered, and the doctrine of the cases accurately stated; thereby furnishing a precedent for almost every conceivable usurious case which may arise. Part II consists of 233 pages, in which the contract of pawn or pledge is fully considered, the proper parties to a pawn or pledge, their rights, obligations and liabilities, and the final disposition of the subject of the pawn or pledge, are designed to be plainly and accurately stated and defined. Part III consists of little less than 100 pages, and is devoted to a concise discussion of the subject of maritime loans, and the law relating to bottomry and respondentia; and the doctrine of the authorities upon the subject is briefly laid down.

The object of this work is to bring within a limited compass the law relating to the important subjects considered; and to this end I have endeavored carefully to examine all the statutes in force, and the decisions of the courts bearing upon those subjects down to the present time, and faithfully give their spirit and import, so that they may be readily comprehended. The subjects

of the work may be regarded as somewhat cognate, and as neither is sufficiently prolific of itself to furnish material for a book of convenient size, I have thought it best to group the whole together in one volume, and thus produce a book of proper dimensions for use. Recognizing the fact that a good index adds greatly to the value of a book, I have given to the work a full and complete, though not prolix, alphabetical index, which I trust may be found convenient and useful. It has sometimes been remarked, that our modern law books are not trustworthy as authority, and that it is never safe to rely upon them without consulting the cases. This, surely, need not be the case, and I flatter myself that I have been enabled to produce a book which may be trusted; and for the reason, that I have been careful to fortify my statements by a reference to the authority upon which they have been made, and in no case to make a statement not sanctioned by competent authority. I have taken liberties with the standard elementary works upon the subjects discussed, but where I have availed myself of the labor of others, I have endeavored, so far as was practicable, to acknowledge the source to which I was indebted. I trust that the work may prove of service to my professional brethren, and an essential acquisition to the library of every practitioner.

DECEMBER, 1872.

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The Law of Usury, Pawns or Pledges, and
Maritime Loans.

PART I.

OF THE LAW OF USURY.

CHAPTER I.

DEFINITIONS OF USURY AND INTEREST — THE WORDS DIFFER IN THEIR MEANING — OPINIONS RESPECTING THE MORALITY OF TAKING INTEREST — ANCIENTLY, THE PRACTICE CONDEMNED — AT PRESENT, IT IS APPROVED.

USURY has been variously defined. The definition given to it by lexicographers is, "money paid for the use of money," or "interest;" and such was the original signification of the word. The etymology of the words usury and interest is the same; but, in modern law, the two words are quite different in their meaning. *Interest* is the premium allowed by law for the use of money; while *Usury* is the taking of more for the use of money than the law allows, or the extortion of a sum beyond what is legal. Lord Bacon, in his able work on "Civil History," pronounces usury to be "the bastard use of money." Judge Blackstone says it is "an unlawful contract, upon the loan of money, to receive the same again with exorbitant increase." (4 *Black. Com.*, 156.). Matthew Bacon says, "Usury, in a strict sense, is a contract, upon the loan of money, to give the lender a certain profit for the use of it, upon all events, whether the borrower made any advantage of it, or the lender suffered any prejudice for the want of it, or whether it be paid on the day appointed or not" (5 *Bac. Abr.*, tit. "*Of Usury*"); and Judge Bouvier says, "Usury is the illegal profit which is required by the lender of a sum of money, from the borrower, for its use." (1 *Bouv. Inst.*, 299.) The definitions by Blackstone and Bouvier give a fair idea of the meaning of the word according to its present use, though no more satisfactory, perhaps, than the one first above given. The true spirit of usury lies in taking an unjust advantage of the necessities of the borrower. The receiving of simple interest is regarded both legal and moral at the present day; while the taking of usury is considered by all Christian nations an offense against the laws of morality and right. It is true that, in former times, many good and learned men perplexed themselves and other people by raising doubts as to the propriety of requiring any compensation for the use of money loaned.

These men made no distinction between this practice and usury; holding any increase of money to be indefensibly usurious. This view of the subject was taken at an early day by ecclesiastical writers, who stigmatized the taking of interest as contrary to the divine law, and by the canons of the church it was forbidden and punished as sinful and against Scripture. Especially, in the dark ages, when learning was confined to the monastery, and commerce was almost unknown, the severest denunciations were thundered by the church against the taking of simple interest, as a "horrible and damnable sin;" and it was ranked with heresy, schism, incest and adultery, and punished by expulsion from the fold of the flock. This position was based upon the construction which they gave to the law of Moses among the Jews: "If thy brother be waxen poor, and fallen in decay with thee, then thou shalt relieve him; *yea, though he be a stranger, or a sojourner, that he may live with thee. Take thou no usury of him, or increase, but fear thy God, that thy brother may live with thee. Thou shalt not give him thy money upon usury, nor lend him thy victuals for increase*" (*Lev. xxv, 35-37*). "Thou shalt not lend upon usury to thy brother; usury of money, usury of victuals, usury of anything that is lent upon usury. Unto a stranger thou mayest lend upon usury, but unto thy brother thou shalt not lend upon usury" (*Deut. xxiii, 19, 20*). But it has been observed, that the Mosaic precept was clearly a political, and not a moral mandate, since it only prohibited the Jews from taking usury from their brethren, the Jews, while, in express words, it permitted them to take it of a stranger; proving that the taking of moderate usury, or a reward for the use of money (for so the word signifies), is not, *ipso facto*, an offense, since it was allowed where any but an Israelite was concerned. Besides, many pious and learned men and commentators have expressed the opinion that usury, in the strict sense of the word, was only unlawful, even among the Jews, when contaminated by oppression, cruelty or extortion. The Israelites were but little engaged in commerce, and their law was not only calculated, but *intended*, to keep them from mingling by any means with other nations. Their land also was divided by lot, and they were not allowed to alienate their inheritances. They were not, therefore, much in the way of lending or taking money upon interest, to employ in trade or expend in estates, in which cases, and in those of the like nature, it does not appear inconsistent with either

equity or law for the lender to receive a proportion of the profits from the borrower. And as the Jews were expressly permitted to take interest of the gentiles, it is evident that increase on lent money is not in itself unjust, or contrary to the divine law, when not attended by oppressive circumstances. Besides, the taking of interest would seem to be sanctioned, or, rather, not forbidden, in the New Testament; for it will be remembered that our Lord, in the parable of the nobleman, declares to the servant that had received one talent and had hid it in the earth, so that it gained nothing, "Thou oughtest, therefore, to have put my money to the exchangers, and *then* at my coming I should have received mine own with usury" (*Mat. xxv, 27*). It is reverently suggested that this injunction would not have been given, even parabolically, if it were immoral, or contrary to the law of Moses.

In the middle ages, during the dark period of monkish superstition and civil tyranny, when commerce was at its lowest ebb on the continent of Europe, and in England itself, and what little there was of it was monopolized by the Jews and the Lombards, so enormous was the interest demanded for the use of money, that the business of the broker or money-lender was considered *detestable*, and this feeling gave rise to the maxim, "*Usuria dicitur quasi ignis urens*:" "It is called usury, as though it were a consuming fire." The brokers, or usurers, during this period, were so cruel and oppressive that all interest on money was laid under a total interdict, and the traffic of the Lombards and Jews was everywhere considered odious and cruel. But when men's minds began to be more enlarged, when true religion and real liberty revived, commerce grew again into credit, and again introduced with itself its inseparable companion, the doctrine of loans upon interest.

Anciently, it was held in England to be absolutely unlawful for a Christian to take any kind of usury or interest for the use of money, and whoever was found guilty of so doing was liable to be punished by the censures of the church in his lifetime, and if after death it was found that the deceased had been a usurer while living, all his chattels were forfeited to the king and his lands escheated to the lord of the fee (5 *Bac. Abr., tit. "Of Usury at Com. Law"*); and even so late as the latter part of the sixteenth century, the great English jurist, Lord Coke, declared all usury unlawful (2 *Inst., 89*; 3 *ib., 151*). But fifty years later, Sir Matthew

Hale, another eminent English jurist, says that at common law the Jewish usury, which was forty per cent, was prohibited, and no other (*Hard.*, 420); and very soon after the time of Sir Matthew Hale, it was generally agreed that the taking of a reasonable interest for the use of money was in itself lawful, and that a covenant or promise to pay it, in consideration of the forbearance of a debt, might be inferred, on the principle that one having an estate in money should be allowed to make a profit by it, as well as another having an estate in land, and that there was no reason why the lender of money should not make an advantage of it as well as the borrower. Indeed, in the thirteenth year of the reign of Queen Elizabeth, a statute was passed, which tolerated the receiving of interest, but restrained it to ten pounds per cent; and near the close of the last century, Dr. Paley, in his excellent and standard treatise upon the Principles of Moral and Political Philosophy, emphatically declares that no reason exists in the law of nature why a man should not be paid for the lending of his money as well as any other property into which the money might be converted (1 *Paley's Phil.*, *Boston sch. ed.*, 108)*. The ancient Athenians held usury in great abhorrence, but they tolerated the taking of interest, which they fixed at rates deemed sufficient to afford a fair profit for the use of the money loaned, having respect to the object to which the money was to be applied.† Among the Romans, during the Empire, the most simple interest was condemned by the clergy of the east and west. Cyprian, Lactantius, Chrysostom, Gregory of Nyssa, Ambrose, Jerome, Augustine, and a host of councils and casuists, were unanimous in their declarations against the practice; but the condemnation of the statesmen, like Cato, Seneca and Plutarch, was more of the *abuse* of usury than of the practice itself.‡ Usury was the inveterate

*Hume, in his thirty-third chapter of the History of England, says: "In 1546 a law was made for fixing the interest of money at ten per cent, the first legal interest known in England. Formerly all loans of that nature were regarded as usurious. The preamble of this very law treats the interest of money as illegal and criminal."

† Among the laws of Solon, the great lawgiver of Athens, recorded by Plutarch, no restrictions upon the trade in money seem to have been enacted; and Boeckh, the German philologist, in his graphic treatise upon ancient Athens, says: "It is a glorious monument of the enlightened and commercial character of Greece, that she had no laws on the subject of usury; that her trade in money, like the trade in everything else, was left wholly without legal restriction."

‡ Calvin, Melancthon, Beza and other eminent reformers, all give their views upon the practice of usury, that is, an oppressive or extortionate interest, which they severely condemn; but nevertheless they express the opinion that the taking of a fair compensation for the use of money is both reasonable and lawful. (*Vide Calvin's Epist.* "De Usure").

grievance of the Republic, and was therefore discouraged by the Twelve Tables, and finally abolished by the clamors of the people. But it was soon revived by their wants and their idleness, tolerated by the discretion of the prætors, and ultimately, in the Empire, it was determined by the Code of Justinian, in which the necessary rules and restrictions in regard to it were inserted (*Vide 4 Gib. Rome, by Milman, 368*).

In the American States, it has never been against the policy of the country; or, at least, it has not been for many generations, for the lender to take simple interest for the use of the money loaned, and the rate has been universally regulated by law. It must be admitted, however, that at the present day there is a class of pseudo reformers, diminutive in numbers as yet, who advocate the doctrine that interest on money lent is extortion, and consequently illegitimate and immoral. Following the example of the communists of Europe, these men declare that capital is of itself unproductive, and that labor alone has rights. The same principle leads to the conclusion, to which they hold, that a person who lends to another a chattel for his use, has no right to call upon the borrower for pay for the loan; all that he can justly require is that the article be returned in good condition. They insist that whether capital be represented by property or money, it is equally unjust to take interest for the use of it. These doctrines, to be sure, are put forth in the main by a few demagogues and agitators who subsist by fermenting the passions and prejudices of the lower orders of the people; and yet they not unfrequently create distrust and inconvenience, especially in the manufacturing and mining districts of the country. But there is no probability that these ideas will ever become a part of the settled policy of any of the States, for the reason that the mercantile and agricultural classes must always be hostile to such a state of things. The necessity of individuals will always make borrowing unavoidable, and without some profit allowed by law, few persons will be found who will lend. The public conscience will, most likely, continue to regard the taking a recompense for the use of money loaned as neither oppressive nor immoral, and laws will continue to exist regulating the rate to be paid, in the absence of any express bargain between the parties. Though money was originally used only for the purposes of exchange, yet the laws of every civilized country have for ages permitted it to be turned to the

purposes of profit. And that the allowance of a moderate interest tends greatly to the benefit of the public, especially in a trading country, is abundantly obvious from that generally acknowledged principle, that commerce cannot subsist without mutual and extensive credit. Unless money can be borrowed, trade cannot be carried on, and, as before hinted, if no premium be allowed for the hire of money, few persons can be found who will lend it, and the life of commerce will be entirely at an end. But while the policy of a reasonable and fair interest for the use of money is almost universally approved, the practice of usury, or the taking of more than the law allows for such use, is quite as uniformly condemned. The laws which regulate the rate of interest, and prescribe the consequences of usury, are quite various, and a correct understanding of all their provisions is important to the legal profession, and to the interests of commerce in general.

CHAPTER II.

HISTORY OF USURY IN EUROPE AND GREAT BRITAIN — DENUNCIATIONS BY THE EARLY WRITERS OF USURERS AND THEIR PRACTICE.

THE occupation of the usurer has been bitterly denounced in all ages of the civilized world, and in most Christian countries there have been laws to suppress it. In respect to the usurer, St. Basil, one of the most learned theologians and illustrious orators of the early Christian church, uses this very extravagant language: "The griping usurer sees, unmoved, his necessitous borrower at his feet, condescending to every humiliation, professing everything that is vilifying; he feels no compassion for his fellow-creatures; though reduced to this abject state of supplication, he yields not to his humble prayer; he is inexorable to his entreaties; he melts not at his tears; he swears and protests that he has no money, and that he is under necessity of borrowing himself; he acquires credit to his lies by superadding an oath, and aggravates his inhuman and iniquitous traffic with the grossest perjury. But when the wretched supplicant enters upon the terms of the loan, his countenance is changed; he smiles with complacency; he reminds him of his intimacy with his father, and treats him with

the most flattering cordiality. 'Let me see,' says he, 'if I have not some little cash in store, for I ought to have some belonging to a friend *who lent it to me on very hard terms*, to whom I pay most exorbitant interest for it; but I shall not demand anything like that from you.' By fair words and promises, he seduces and completely entangles him in his snares; he then gets his hand to paper and completes his wretchedness. How so? By dismissing him bereft of liberty." And he closes by giving the advice: "Sell thy cattle, thy plate, thy household stuff, thine apparel; sell anything rather than thy liberty; never fall under the slavery of that monster, usury." This language, to excite disgust of the usurer, was used in the fourth century; but equally strong language has been frequently used since. In the seventeenth century, John Blaxton, an English writer of some eminence, gave a description of the usurer, saying, "The usurer is known by his very looks often, by his speeches commonly, by his actions ever; he hath a lean cheek, a meager body, as if he were fed by the devil's allowance; his eyes are almost sunk to the backside of his head with admiration of money, his ears are set to tell the clock, his whole carcass is a mere anatomy" (*Vide Blaxton's "English Usurer"*). And the learned Dr. Fenton says, "The testimony of all authority, civil and humane, ecclesiastical and profane, natural and moral; of all ages, old, new, middling; of all churches, primitive, superstitious, reformed; of all common creeds, Jewish, Christian, heathenish; of all lands, foreign and domestic, are against usury; * * * usury was never even defended for fifteen hundred years after Christ." Volumes have been published at different times, purporting to give an authentic history of the laws to prevent usury from the earliest period, but a very brief outline of the subject must suffice for the purposes of this work.

In the year 1819, over fifty years ago, there was an important case in the Court of Errors of the State of New York, involving the question of usury, and the counsel for one of the parties made a violent assault upon the usury laws then in force in the State; so much so, that the eminent Kent, then chancellor, and a member of the court, felt justified in spending a little time in their defense, and in the course of his remarks he gave some very interesting items of history in respect to usury laws in general. He said: "If we look back upon history, we shall find that there

is scarcely any people, ancient or modern, that have not had usury laws. I believe there is not a nation in Europe at this day without them. In ancient Rome, according to Tacitus (*Ann.*, lib. 6, ch. 16), usury was discouraged in the early period of the Republic by the Twelve Tables, which reduced interest to one per cent. It was afterward lowered to one-half per cent, and finally abolished by the clamors of the people. It was revived in the ages of commerce and luxury, but placed under necessary restrictions. Four or six per cent was the ordinary interest; eight per cent was allowed for the convenience of commerce, and twelve per cent might be taken for maritime hazards by the laws of Justinian, but the practice of more exorbitant interest was severely restrained.

“The Romans, through the greater part of their history, had the deepest abhorrence of usury. They did not derive their objection to usury from the prohibitions in the Mosaic law, nor did they hold it sinful, as the learned Fathers of the early and middle ages of the church have done, for they knew nothing of that law. The Roman lawgivers and jurists acted from views of public policy. They found, by their own experience, that unlimited usury led to unlimited oppression, and the extortion of the creditor and the resistance of the debtor were constantly agitating and disturbing the public peace.

“But it is not only the civilized and commercial nations of modern Europe, and the sage lawgivers of ancient Rome, that have regulated the interest of money. It will be deemed a little singular that the same voice against usury should have been raised in the laws of China, in the Hindoo Institutes of Menu, in the Koran of Mahomet, and, perhaps we may say, in the laws of all nations that we know of, whether Greek or barbarian.

“There is one exception, however, that I ought to notice, and which is supposed to be found in the laws of Solon, given to the Athenian republic. This celebrated lawgiver is said to have allowed parties to regulate the rate of interest by their own contracts. When Solon was called to make laws for Athens, the State was in complete anarchy; and when he was asked if he had provided the best laws for the Athenians, he replied that he had provided the best that their prejudices would admit of. One of his first steps was to cancel all existing debts; though, according to Plutarch (*Life of Solon*), it is not certain that he proceeded to this violent measure, for many said that he did not cancel debts, but only

moderated the interest. And the result of his laws allowing interest to regulate itself, I shall give in the words of De Pauws (*Recherches Philosophique sur les Greces*, 5 *Lect.*, § 2). He says that usage fixed the rate of interest at twelve per cent, in certain cases, and at eighteen per cent in others, and that the Athenians regarded all those who did not conform to this usage as usurers, that is, as the most vile and the most ignominious of mankind. The public voice which cried against them, and the profound contempt to which they were condemned, formed a punishment so great that the lawgiver did not deem it necessary to add any other punishment. The usage, in this case, formed the law. Now, according to this view of the fact, interest was limited at Athens as effectually and forcibly by discretionary law as it would have been by any penal statute; and the Athenian commonwealth is not to be cited as a real exception to the general practice of mankind.

“The principal error which has prevailed on this subject is the condemnation of any kind of interest, however small. A host of great names, from Aristotle among the Greeks to the modern civilians, such as Domat and Pothier, might be cited, who rank all interest of money under the name of usury, and condemn it. But the sense of mutual benefit has, on this point, resisted, with great firmness, the decrees of the church and the speculations of philosophers, and a regulated and reasonable interest has had the sanction not only of our own municipal laws, but of the most cultivated and enlightened human reason. Grotius (*lib.* 2, *c.* 12, §§ 20, 22), after discussing the question whether usury be permitted by the natural and divine law, concludes that a reasonable interest may be permitted; and he cites Holland as an instance in which eight per cent is the ordinary, and twelve per cent the mercantile interest. But he insists that interest cannot be rightfully permitted beyond a reasonable limit: *Non mordaces sed mordice*, according to Heineccius, in his commentary on this passage, and who admits that it belongs to the discretion of the lawgiver to regulate the *quantum* of interest. He says, further, that in Germany, by imperial ordinances, in 1600 and 1654, interest at the rate of five per cent was allowed, though the canons of the church everywhere condemned it, and higher interest is now admitted” (*Dunham v. Gould*, 16 *Johns. R.*, 367, 376–378.).

In England, usury was an object of hatred and legal animadversion at least as early as the time of Alfred, king of the West

Saxons, in the ninth century; and Glanville, Fleta and Bracton bear the most decided testimony to the abhorrence in which it was held, and to the severity with which it was punished. No terms of opprobrium were spared by the early writers on the guilty wretches who dared not only to disobey what they understood to be the express commands of holy writ, but even to subvert the laws of nature, and to cause fruitfulness in that which had been intended to be barren and unproductive. But the detestation in which this "horrible vice" was contemplated, begun in the time of Henry VIII, in the first half of the sixteenth century, seems to have been somewhat diminished, and in the thirty-seventh year of that king's reign an act was passed by which the taking of interest for the use of money was expressly sanctioned and allowed. This was the first act in England recognizing the legality of interest on loans, but it was not without some restraint. By the act, ten per cent was prescribed as the sum to be received "for the forbearance or giving day of payment of one whole year, and so after that rate;" and it was enacted that any person receiving more than the prescribed ten per cent should forfeit, for every offense, the total value of the money or thing forborn, and suffer imprisonment, and that one moiety of the forfeiture should go to the king and the other to the prosecutor.*

But it appears that this indulgent statute of Henry VIII did not have the desired effect of suppressing corrupt and exorbitant rates, and it was declared that "divers persons, blinded with inordinate love of themselves, had mistaken the same as a maintenance and allowance of usury," and the act was repealed in the following reign by an act which, after premising that "usury is by the word of God utterly prohibited as a vice most odious and detestable, which thing by no godly teachings and productions can sink into the hearts of divers greedy, uncharitable and covetous persons, nor by any terrible threatening of God's wrath and vengeance that justly hangeth over this realm for the great and open usury therein daily used and practiced, they will forsake such

* Mr. Jefferson, in a letter to Mr. Hammond, which will be found in the first volume of the American State Papers, first edition, at page 307, says that "in England all interest was against law until the statute of 37 Henry VIII, ch. 9;" and he furnishes the strongest reasons for confidence in his correctness, by the statement of a fact, that interest at that date was considered unlawful in all Roman Catholic countries until the time referred to. When the statute of 37 Henry VIII was passed, that was the established religion in England. This was early regarded by the courts as a starting point of some importance, as it was thought to have a considerable bearing in construing the statutes on the subject.

filthy gain and lucre unless some temporal punishment be provided," proceeds to make all interest for money illegal, and enacts that no person shall lend any sum of money "for any manner of usury, increase, lucre, gain or interest, to be had, received or hoped for, over and above the sum so lent, upon pain of forfeiture of the value of the sum lent, and also of the usury" (5 and 6 *Edward VI, ch. 20*).

It was found that the statute of Edward VI did not accomplish the desired effect, and in the reign of Elizabeth another act was passed, which, although it acknowledged that "all usury, being forbidden by the law of God, is sin and detestable," declared that the former act had not done so *much* good as was hoped it would, but *rather* the vice of usury had *much more exceedingly* abounded; and therefore it repealed the statute of Edward and revived the act of Henry VIII, and established the legal interest once more at ten per cent.

But, as the disposable capital of the nation increased, ten per cent interest was considered too high, and in the following reign of James I, in 1624, the rate was reduced to eight per cent, and for the satisfaction of the bishops, whose scruples interfered, the statute was made to end with a proviso, that no words in the law contained should be construed or expounded to allow the practice of usury, *in point of religion or conscience*. In reference to this act, Sergeant Rolle said: "Usury hath been holden infamous by all statutes, as horrible and damnable; and when the last statute of eight per cent was made, the bishops would not consent to it, because there was no clause in it, as Judge Dodridge said, to disgrace usury as in former statutes, and for this, as the judges were sitting upon it, a clause was added for this purpose for their satisfaction, as may be seen at the end of the statute" (*Vide Oliver v. Oliver, 2 Roll. R., 469*).

In the twelfth year of the reign of Charles II, another act was passed, which recited that "the abatement of interest from ten to eight per cent had, from notable experience, been found beneficial to trade and agriculture, with many more advantages to the nation, and reducing it to a nearer proportion with foreign States with which we traffic," and then reduced the legal rate of interest to six per cent. This act remained unchanged for fifty years, and until 1713, when, in the twelfth year, of the reign of Queen Anne, an act was passed entitled "An act to reduce the rate of interest,

without any prejudice to parliamentary securities," which fixed the rate of interest at five per cent. This act was generally known as the "Statute of Usury," and enacted, in substance, that no person should take, directly or indirectly, for loan of any money, wares, merchandise or other commodities whatsoever, above the value of £5 for the forbearance of £100 for a year, and so after that rate for a greater or lesser sum, or for a longer or shorter time; and that all laws, contracts and assurances whatsoever, made for the payment of any principal, or money to be lent or covenanted to be performed upon or for any usury whereupon or whereby there should be reserved or taken above the rate of £5 in £100 should be utterly void; and that any person who should take, accept and receive, by way or reason of any corrupt bargain, loan, exchange, chevisance, shift or interest of any wares, merchandise or other thing or things whatsoever, or by any deceitful way or means, or by any covin, engine or deceitful conveyance, for the forbearing or giving day of payment for one whole year, of and for their money or other thing, above the sum of £5 for the forbearing of £100 for a year, and so after that rate for a greater or lesser sum, or for a longer or shorter time, should forfeit and lose for every such offense the total value of the moneys, wares, merchandises and other things so lent, bargained, exchanged or shifted. The statute then provided that scriveners, brokers, solicitors and drivers of bargains for contracts should take only five shillings brokerage for procuring the loan or forbearing of £100 for a year, and so ratably; and for a violation of the provision, the person offending was adjudged to forfeit for every offense £20 with costs of suit, and suffer imprisonment for half a year; the one moiety of the forfeiture to be to the queen's most excellent majesty, her heirs and successors, and the other moiety to whoever would sue for the same in the county where the offense was committed, and not elsewhere. It may be well to note the terms of this statute, from the fact that the most of the acts against usury since the passage of the same, both in England and in this country, have been framed from 'he statute of Queen Anne, and hence the decisions of the courts, under this act, are applicable in most cases of usury at the present day. In fact, the statute of Anne, like those of Elizabeth, James and Charles, is founded upon the statute of Henry VIII, and, indeed, varies very little in any other substantial respect than the rate of interest

prescribed ; so that the cases which were decided under the statute of Henry may be taken as authorities applicable to all the subsequent statutes, and consequently as declaratory of the law of usury at the present time, under the statute of Queen Anne. When contracts were made in a foreign country, the English courts directed the payment of interest according to the rate allowed in such country ; and Irish, American, Turkish and Indian interest was sometimes allowed to the amount of even twelve per cent, because, as was alleged, the refusal to enforce such contracts would put a stop to all foreign trade. But by an act passed in the thirteenth year of the reign of George III, no subject of his majesty in the East Indies was allowed to take *more* than twelve per cent for the loan of any money or merchandise for a year ; and every contract for more, it was declared, should be void. And it was further enacted, that any person receiving more should forfeit treble the value of the money so lent, with costs, one moiety to the East India Company, and the other to him that would sue in the courts of India. And if no such prosecution was had within three years, the party aggrieved might recover what he had paid above twelve per cent ; and the compounding any such risk was made punishable with fine and imprisonment.

By an act passed in the fourteenth year of the same reign, it was enacted that all mortgages and other securities on lands, tenements, hereditaments, slaves, cattle or other things in Ireland, and also in his majesty's colonies or plantations in the West Indies, or any estate or interest therein, which should be made in Great Britain to any of his majesty's subjects, should be as valid as if they had been made in the country where the property lay, provided the interest to be received did not exceed six per cent ; and also provided the lender had not loaned more than he knew the property secured to be worth. And any person borrowing more than the property secured was worth was made to forfeit treble the value of the sum borrowed, half to go to the informer, and half to the treasurer of Greenwich Hospital.

By an act passed in the third year of the reign of George I, the governor and company of the Bank of England were enabled to borrow money at whatever rate of interest, or upon such terms as they might think fit ; and the same liberty was given to the South Sea Company, by another act passed the same year. Thus the law stood, with no substantial variation, until the reign of William

IV, when an act was passed exempting from the usury laws all bills and promissory notes made payable at or within three months after the date thereof, or not having more than three months to run; and, by an act passed several years later, the exemption was extended to bills and notes payable at or within twelve months, or not having more than twelve months to run.

By an act passed in the second and third years of the reign of Queen Victoria, it was enacted that no bill of exchange or promissory note, made payable at or within twelve months after the date thereof, or not having more than twelve months to run, nor any contract for the loan or forbearance of money above the sum of £10 sterling, should, by reason of any interest taken thereon, or secured thereby, or any agreement to pay, or receive, or allow interest in discounting, negotiating or transferring any such bill of exchange or promissory note, be void; nor should the liability of any surety to any such bill of exchange or promissory note, nor the liability of any person borrowing any sum of money as aforesaid, be affected by reason of any statute or law in force for the prevention of usury; and it was declared that no person should be liable under any usury law for any penalty or forfeiture for the forbearance of any money, or taking more than legal interest, in Great Britain or Ireland respectively; provided that nothing contained in said act should extend to the loan or forbearance of any money upon security of any lands, tenements or hereditaments, or any estate or interest therein. And it was further declared, that nothing in the act contained should be construed to enable any person to claim, in any court of law or equity, more than £5 per cent interest on any amount, or on any contract or engagement, notwithstanding they might be relieved from the penalties against usury, unless it should appear to the court that any different rate of interest had been agreed to between the parties; and the act left all laws relating to pawnbrokers unrepealed and unaffected by the act.

By the provisions of the act of Queen Anne, all bills of exchange or promissory notes on a usurious consideration were held to be absolutely void, even in the hands of *bona fide* purchasers; but the British Parliament, acknowledging the hardship of this rule, in the fifty-eighth year of the reign of George III, in 1818, passed an act declaring that "no bill of exchange or promissory note shall, though it may have been given for a usurious consideration, or upon a usurious contract, be void in the hands of an indorsee for *valuable*

consideration, unless such indorsee had, at the time of discounting or paying such consideration for the same, actual notice that such bill or note had been originally tainted with usury."

It will be observed that the laws of Great Britain relating to usury gradually became less and less stringent; and, some dozen years ago, public opinion had reached a crisis which called for free trade in interest, and, accordingly, Parliament passed an act repealing all laws then in force upon usury, and such is the state of the law in that kingdom at the present day (17 and 18 Vict., *ch.* 90). It seems that, in every period of the history of the laws of usury in Great Britain, the *usurer* has alone been regarded as the guilty party; although, in one case, Chief Justice Treby, before whom it was tried, held that the borrower of money at usurious interest was *in pari delicto* with the lender, and that there was no reason why he should be permitted to recover back the money paid, because he had parted with it freely, and *volenti non fit injuria* (*Tomkins v. Bernet*, 1 Salk. R., 22). But the doctrine was soon exploded; and, according to Lord Mansfield, Lord Hardwicke and Lord Talbot both declared their disapprobation of it. And, with regard to parties becoming *particeps criminis*, the distinction was laid down between the prohibitions of statutes made to protect weak or necessitous men from being overreached or oppressed; and the prohibitions of statutes enacted upon general reasons of policy and public expediency. In the latter case, all parties are equally criminal; in the former, the oppressor is alone within the pale of the law (*Clarke v. Shee*, *Cowp. R.*, 200). This doctrine has been universally recognized as correct, both in England and in this country; and in no case is the borrower held to be a criminal for paying, or refusing to pay, usurious interest.

CHAPTER III.

HISTORY OF USURY IN THE COLONIES AND IN THE AMERICAN STATES.

THERE is not as much of interest in the history of usury in the American States as in that of Great Britain. Indeed, the history of the subject in this country from the first settlement of the colonies until the Revolution is little else but a repetition of the sub-

ject during the same period in the mother country. The colonies, in peace, were governed by the laws of the home government, and among the rest they adopted the rules of that kingdom in respect to usury, and abided by the same until their respective law-making bodies enacted a code for themselves, and even then the changes were usually slight and of but trifling importance.

Perhaps the first act passed by any of the colonies relating to interest and usury was that of the colony of Massachusetts, passed in 1641, by which it was ordered and decreed that no man should be adjudged for the mere forbearance of any debt above £8 in £100 for one year, and not above that rate proportionably for all sums whatsoever, bills of exchange excepted; but it was expressly declared that this should not be a color or countenance to allow any usury amongst them contrary to the law of God. This continued to be the law of the colony for one hundred and fifty years, when in 1793 an act was passed reducing the rate of interest to six per cent, and making all contracts in which more than six per cent interest was reserved utterly void, and inflicting a penalty for receiving illegal interest to the full value of the money, goods or other things received, one moiety to the government and the other to the person prosecuting for the same. This act, with slight variations, continued to be the law in Massachusetts until 1825, when the law was modified so that the contract reserving illegal interest was not thereby rendered void, but in such cases the defendant could recover his full costs, and the plaintiff forfeited threefold the amount of the whole interest reserved; and if the illegal interest had been paid, the party paying the same was permitted to recover back threefold the amount of the whole interest paid, provided an action was prosecuted therefor within two years from the time such interest was paid. This last act remained in force, substantially, until 1867, when all usury laws were repealed.

In the State of Vermont, the first statute upon the subject of usury seems to have been passed in October, 1797, which fixed the rate of interest at six per cent, and when more was reserved the excess and twenty-five per cent addition was forfeited, one moiety to the State and the other to the prosecutor. In 1822 another statute was passed, which retained the rate of interest at six per cent, and provided that, in case more was paid, the excess might be recovered back by the person paying the same, with the

interest thereon from the time of payment, and such has been the law in substance ever since.

The first act regulating interest for the use of money in New Hampshire was passed February 12, 1791, which fixed the rate at six per cent, and if more was taken, three times the excess was forfeited, one moiety to the prosecutor and the other moiety to the use of the county in which the offense was committed, with costs of prosecution, and this law has never been materially changed.

The first act against usury in the State of Maine was passed in 1821, which fixed the rate of interest at six per cent, and a party who took a greater rate forfeited the whole sum, principal and interest. This act was amended in 1834, by which, in case of illegal interest, the excess only was forfeited, and the provisions of the act as amended were in force until the law now in force in the State was passed, which leaves the parties free to agree upon any rate of interest they please.

In the State of Rhode Island, an act was passed in 1767, which was amended in 1795, and again in 1817, by which the rate of interest was fixed at six per cent. In 1822 a new act was passed retaining the legal rate of interest at six per cent, and in case more was agreed to be paid, the contract could only be enforced for the principal and legal interest; and by the law now in force any agreement which the parties may make, in respect to the rate of interest, may be enforced.

The first statute against usury in Connecticut was published as early as 1718, which fixed the legal rate of interest at six per cent, and declared all contracts by which more was reserved wholly void. This act was amended from time to time, but not substantially varied until the passage of the law now in force in that State upon the subject of usury and interest, and which is noticed in a subsequent chapter.

The first act against usury in New York was passed by the colonial Legislature in 1717, which fixed the rate of interest at six per cent, and in its other provisions was similar to the English statute of Queen Anne. The next year the act was amended, raising the rate of interest to eight per cent. In 1737 the rate was reduced to seven per cent, and the act, as thus amended, continued without substantial variation until the Revised Statutes of 1830 went into effect, which, as amended in 1837, contain the law upon the subject now in force in this State.

The first act against usury in New Jersey was passed in 1738, which fixed the rate of interest at seven per cent, and declared all contracts reserving a greater rate utterly void, and, if anything was received on a usurious contract, it was to be forfeited. In 1823 the legal rate of interest was reduced to six per cent, and the act, as thus amended, continued in force until the adoption of the present statute upon the subject in the State.

In the State of Delaware, the rate of interest was fixed, by an act of the Legislature, passed in 1759, at six per cent, and any person taking more forfeited the whole debt, one moiety to the State, and the other to the person prosecuting; and this law has never been materially changed.

In Pennsylvania, the first colonial act fixed the rate of interest at eight per cent, but in 1700 the same was reduced to six per cent, and, if more was received, the money or thing lent was forfeited. The act of 1700 was repealed in 1705, and eight per cent as the legal rate of interest restored; but in 1723 the act of 1700 was re-enacted, and thus the law stood substantially until the law at present in force in the State went into effect.

The first act in respect to interest and usury, in Ohio, was passed by the territorial Legislature in 1795, which was repealed by an act of the same Legislature in 1799, and the rate of interest fixed at six per cent, and, if more was reserved, the excess was forfeited. The first act of the State Legislature upon the subject was passed in 1804, which did not materially alter the act of the territorial Legislature then in force, and the law has remained substantially the same ever since.

In Michigan, the territorial Legislature passed an act in 1833, fixing the legal rate of interest at seven per cent, and the same was amended by the State Legislature in 1846, and the act, as thus amended, is the present law of the State.

The first act against usury in Maryland was passed in 1692, by which the rate of interest for the loan of money was fixed at six per cent, and for the loan of tobacco and other property at eight per cent; and any contract which reserved more than legal interest was declared to be utterly void, and, if the illegal interest was actually paid, treble the value of the money or goods taken was forfeited. In 1704 a substantially similar act was passed, which has continued, with no material variation, until the present day.

In Virginia, in 1730, the Legislature passed an act fixing the rate

of interest at six per cent. In 1734 the former act was amended, reducing the rate to five per cent, and giving the prosecutor his costs. The provisions of this act, as thus amended, were in force until 1796, when another act was passed, taking effect in May, 1797, which raised the rate to six per cent, which has continued to be the rate ever since. The penalty for taking usury, under the original and subsequent acts, was a forfeiture of twice the amount of the debt, recoverable in an action *qui tam*.

The original act relating to usury and interest in North Carolina was passed in 1741, and fixed the rate of interest at six per cent, and all contracts reserving a greater rate were declared to be void. This act, although several times amended, has been substantially the law of that State up to the present time.

In South Carolina, a law was passed against usury in 1719, and another in 1721, which prohibited parties taking more than ten per cent for the use of money, under the penalty of forfeiting treble the amount of the principal or thing loaned. In 1748 the rate of interest was reduced to eight per cent; and again, by a law passed in 1777, the rate was reduced to seven per cent. The clause in the previous acts imposing the penalty for taking more than the legal interest was repealed in 1830, but no contract, by this act, could be enforced for anything but the principal and legal interest; and thus the law continued until the passage of the act at present in force in that State.

The first act against usury in Georgia was passed in 1759, which fixed the rate of interest at eight per cent, but in other respects it was similar in all its provisions to the British statute of Queen Anne. This act was repealed, or essentially modified, in 1822, so that contracts in which more than eight per cent interest was reserved were not to be void, but the principal due thereon might be recovered at law, but no more. The act of 1822 continued in force until 1845, when the law at present in force in the State was passed.

In the State of Florida, an act concerning usury and interest was passed in 1822; two acts were passed in 1829 to regulate the rate of interest; another was passed upon the subject in 1832, which was virtually repealed in 1833, and the rate of interest fixed at eight per cent, where no rate of interest was expressed in the contract, but the parties were allowed to agree upon a higher rate not exceeding ten per cent, and, if more was reserved, the whole

interest was forfeited. This last act was repealed in 1844, and the rate of interest fixed at six per cent, in the absence of any stipulation upon the subject, but the parties were at liberty to raise the rate to eight per cent, with the previous penalty for taking more than the legal rate; and thus the law stood until the passage of the act now in force in the State.

The first act in respect to interest in Alabama was passed in 1805, and fixed the rate at six per cent. In 1818, another act was passed allowing parties to agree, in writing, upon any rate of interest; and in 1819, still another act was passed, which has been once or twice amended, and is still the law of the State.

In the State of Mississippi, the rate of interest was fixed, in 1822, at eight per cent, and whenever it was ascertained that more had been reserved, the principal sum only could be recovered; but in cases of loan of money, the parties might agree upon a rate as high as ten per cent, and the contract be enforced. This continued in force until 1842, when the law at present in force was passed.

In Tennessee, an act was passed in 1819, making usury an offense, but retaining the rate of interest theretofore recognized; and, in 1835, the law now in force in the State was passed, the provisions of which will be given in a subsequent chapter.

By the Civil Code of Louisiana, adopted at an early day in the State, it was declared that interest is either legal or conventional; and the rate of legal interest was fixed at five per cent, and conventional interest, to be stipulated by the parties, not to exceed ten per cent. This continued to be the law until the act now in force was passed, in 1860, and which is incorporated into the Revised Statutes of 1870.

The first act regulating interest in the State of Arkansas was approved in February, 1838, by which the rate was fixed at six per cent; but the parties were permitted to agree, in writing, for the payment of interest not exceeding ten per cent, and all bonds and other securities in which illegal interest was secured were declared to be void, except that negotiable paper in the hands of an indorsee or holder who had received the same in good faith and for a valuable consideration, without actual notice of the wrong, could not be impeached for usury, and when illegal interest was paid, the excess could be recovered back. Such was the law until the adoption of the present State Constitution, which

prohibits the passage of any law limiting the parties to any rate of interest for which they may be pleased to agree..

In the State of Texas, previous to the adoption of the present Constitution of the State, the legal rate of interest was fixed at eight per cent, but the parties were at liberty to agree upon any rate not exceeding twelve per cent. The present Constitution upon the subject is the same as that of Arkansas.

In California, the act in respect to interest was passed in 1850, and the same is now in force, the provisions of which will be given in a subsequent chapter. And in respect to Oregon, Nevada, Nebraska, Kansas, Iowa, Minnesota and Wisconsin, they having been so recently organized as States, there is nothing to be said relating to their laws regulating interest, except to give the acts now in force in those States, which will all be found in a subsequent chapter.

The history of usury in Missouri is told in a few words. The first act of the State was passed in 1834, and fixed the rate of interest at six per cent; but the parties to a contract might stipulate for a higher rate, not exceeding ten per cent, and if more was reserved, the whole interest was forfeited, and only the principal, without any interest, could be collected. This act, although amended several times, continued to be the law until the act now in force was enacted and approved.

The first act against usury in Kentucky was passed in 1798, under which a contract reserving more than legal interest was void. In 1819, this act was repealed, and the rate of interest fixed at six per cent, and if a higher rate was agreed upon, the excess could not be collected, but the instrument was valid for the principal and legal interest; and this act is substantially in force at the present day.

In the State of Illinois, an act was passed in 1833, by which the rate of interest was fixed at six per cent, but providing that when the parties expressly agreed upon an amount of interest not exceeding twelve per cent it should be legal. A higher rate than twelve per cent was forbidden under a forfeiture of threefold the amount of the whole interest reserved, one-third to the borrower, and the other two-thirds to the treasurer of the county in which the suit was instituted to recover the amount of principal and interest. This act was several times amended, and in some respects

changed, until the law was passed which is in force in the State at the present time.

In Indiana, by an act passed in 1831, any rate of interest could be taken, provided the parties agreed therefor in writing, and the agreement was signed by the party to be charged. In 1838, another act was passed which fixed the rate at six per cent, unless the parties stipulated for a higher rate of interest in writing and signed by the party to be charged, but in no case could more than ten per cent be taken; and any person taking illegal interest was subject to be indicted, and upon conviction be made to pay a fine to the State, for the use of the county treasurer of the county in which the offense was committed, of double the amount of the excess of interest received above the amount allowed by law. This continued to be the law until the act was passed which, at present, is in force in the State. Such is briefly the history of usury in the several States; and it will be observed that in most cases statutes have existed to prohibit the taking of illegal interest, although in several of the States the laws against usury have been considerably relaxed in comparison with those which were originally enacted.

CHAPTER IV.

THE POLICY AND PROPRIETY OF USURY LAWS — ARGUMENTS AND OPINIONS UPON THE SUBJECT.

It is always more important to know what the law really is, than to be able to give a satisfactory reason for it. At the same time, a correct idea of the policy of an enactment will the better enable one to determine the light in which the same may be viewed by the courts, for it cannot be disguised that a decided public opinion has its influence upon adjudication. In respect to the policy of statutes against usury, there is now, and always has been, a great variety of opinion. The first law to prevent usury, that is, the taking of more than legal interest for the forbearance of money, in England, was, as we have seen, the statute of Henry VIII, passed in the sixteenth century. Previous to that, laws had existed making it penal to take any interest for the loan of money. This act was subsequently made more stringent, but restored in

the thirteenth year of the reign of Queen Elizabeth, in the year of our Lord 1570, and from the passage of the act of 13 Elizabeth, laws existed in some form for the suppression of usury, until the act of 17 and 18 Victoria, chapter 90, by which all laws then in force upon usury were repealed. During all this long period, the propriety of usury laws was frequently discussed, both in England, on the continent of Europe and in the American States. Lord Bacon, in one of his essays, civil and moral, examined the arguments *pro* and *con.*, in which he says: "Many have made witty invectives against usury. They say that it is pity the devil should have God's part, which is the tithe; that the usurer is the greatest Sabbath breaker, because his plow goeth every Sunday; that the usurer is the drone that Virgil speaketh of:

'Ignavum fucos pecus a præsepibus arcent;'

that the usurer breaketh the first law that was made for mankind after the fall, which was, *in sudore vultus tui comedes panem tuum*; that usurers should have orange-tawny bonnets, because they do Judaize; that it is against nature for money to beget money, and the like. * * Few have spoken of usury usefully." He then opens up the "incommodities" and "commodities" of usury, and concludes that by "the balance of commodities and discommodities of usury, two things are to be reconciled; the one, that the tooth of usury be grinded, that it bite not too much; the other, that there be left open a means to invite moneyed men to lend to the merchants, for the continuing and quickening of trade." And finally he says "that it is better to mitigate usury by declaration than to suffer it to rage by connivance" (*Bac. Essays, Civ. and Mor., No. 41*). Somewhat later, John Locke, the great English philosopher, declares, "money is an universal commodity, and is as necessary to trade as food is to life, and everybody must have it at what rate they can get it, and invariably pay dear when it is scarce; you may as naturally hope to set a fixed price upon the use of houses or ships as of money. Those who will consider things beyond their names will find that money, as well as other commodities, is liable to the same change and inequality, and the rate of money is no more capable of being regulated than the price of land." Later still, Jeremy Bentham, the English judicial philosopher, in treating of the usury laws of England, said: "As well might a clause be added fixing and reducing the price of horses. It may be said against fixing the price of horseflesh that

different horses may be of different values. I answer, not more different than the values which the use of the same sum of money may be of to different persons on different occasions" (*Benth. Def. of Usury*, 82). Lord Chief Justice Best, in 1825, in delivering the unanimous opinion of the twelve judges in the House of Lords upon a question submitted to them under the English usury laws, said: "The supposed policy of the usury laws in modern times is to protect necessity against avarice, to fix such a rate of interest as will enable industry to employ with advantage a borrowed capital, and thereby to promote labor and increase national wealth, and to enable the State to borrow on better terms than could be made if speculators could meet the ministers in the money market on equal terms. Laws framed on these principles are limited to the countries in which they are made. The foreign borrower wants not the protection of our laws, nor can it be extended to him. We may declare a contract void, but notwithstanding such declaration it may be enforced in the courts of the country in which it is made, if it be not repugnant to the laws of that country. We leave the industry of other countries to the care of their respective governments. I will not say that it is impossible that our capitalists may be tempted by the high rate of interest in other countries to send money out of their own. I believe that our own government and commerce were inconvenienced by the large loans made by the servants of the India Company to the Nabob of Arcot. But the risk of loans to persons living out of the reach of British laws is so great that in general much capital will not be drawn by those out of the country" (*House of Lords*, 3 *Bing. R.*, 193; *S. C.*, 11 *Eng. C. L. R.*, 93, 95). Lord Henry Brougham, late high chancellor of England, when in the House of Commons in 1816, gave the opinion: "The repeal or modification of the usury laws is a measure, in the present age, which nearly all mankind agree is perfectly safe, and calculated to afford the greatest measure of relief, and is, besides, innocuous alike to the borrower, to the lender and to the State." Again: "The greatest characters of the age have despised these laws. Sir Francis Baring, more than thirty years ago, strongly denounced them as injurious to those for whose benefit they were intended." And Mr. James Birch Kelly, in his "Summary of the History and Law of Usury, its Policy, and Suggestions for its Amendment," published in London in 1835, says: "All experience teaches us how unprofitable it is for the law to fix a maximum

rate of interest applicable to every period. When there is little demand for money, it can be borrowed for less than the legal rate of interest on good security. When the contrary is the case, the law is evaded and more than legal interest given; for whatever may be the municipal regulation, there is no axiom better established than that 'money, like water, will always find its own level;' that it is governed by the same rules, as to production and distribution, which affect all other merchantable commodities, and that the rate of interest for its use is no more capable of being regulated by law, than are the rates of insurance or the price of labor, and that 'free trade in money is the only way of rendering it abundant'" (*Kelly on Usury*, 187). These and numberless other opinions and arguments put forth in favor of "free trade in money," together with the general spirit of legal reform in England, have produced the repeal of all laws relating to usury in that kingdom, and the whole matter of interest on money loaned is now regulated there by the voluntary contract of the parties.

Grotius, the learned Dutch jurist and writer of the seventeenth century, speaking of interest for the use of money, observes: "If the compensation allowed by law does not exceed the proportion of the hazard even, or the want felt by the loan, its allowance is neither repugnant to the revealed nor the natural law; but if it exceeds those bounds, it is then oppressive usury; and though the municipal laws may give it uniformity, they can never make it just" (*De Jure Belli et Pacis*, 2 l., ch. 11, § 22).

From the earliest history of this country, the policy of laws against usury has been a matter of discussion, although but little has been put forth upon the subject, except a repetition of the arguments and positions used and taken by the different writers upon the other side of the Atlantic. It may be safely affirmed, however, that in most of the American States which were organized within the first fifty years of the Republic, the experiment was, at some time, tried, of doing without usury laws of any kind, but the experiment was regarded as a failure, and statutes were ultimately passed fixing the rate of interest, and prohibiting the taking of any more than the legal rate. Perhaps the opinions of the opponents of usury laws in the States are as fairly represented as anywhere in a petition addressed to the Legislature of Massachusetts in 1834, from certain citizens of Boston, in which it was asked that the then existing laws in that State against usury be

repealed. In the judgment of the petitioners, as declared in their petition, all usury laws, so far as they limit the rate of interest, are founded on erroneous principles, and are at variance with the commercial spirit of the age; that every article of human traffic, whether money or any other thing, is alike subject to fluctuation of *value*, and that consequently the market *price* of them all is constantly liable to change; that the price of money, or, more properly speaking, the price of its use, not less than the price of lumber, corn, tobacco, cotton or any other great commercial staple, is and must be regulated by the extent of the demand in the market, and that every attempt to fix their value, and render the price of any of those articles invariable, is not only vain, but wholly unjust, and that it is, in the case of all these commodities, an equal infringement of private rights; that where the use of money in the regular course of business produces a large amount of profit, the value of that use is proportionately increased; that the law is wrong in imposing any restraint upon the absolute freedom of commercial transactions, which, in order to be successful, must be left unfettered, and that in the case of money, which represents every other commodity, the evil is far greater than it could be in the case of any other article of traffic; that while the restrictions were intended to favor the interests of borrowers, they were even more injurious to borrowers than to lenders. This the petitioners attempt to demonstrate; and, for the reasons stated, it was asked that the law of the State be so modified as to leave the rate of interest, like the rate of premiums on insurances, perfectly open to contract, providing that in all cases where interest occurs, and the particular rate has not been expressly agreed upon between the parties, six per cent remain the legal rate. The petition was referred to a committee, who made their report to the Legislature, in which they indorsed fully the views and arguments of the petitioners; but believing that any sudden and extensive changes in the laws were inexpedient, they recommended a repeal of the usury laws only so far as they applied to promissory notes and bills of exchange, payable not less than three months from date; the evils being felt more seriously in reference to this class of contracts than any other.

These views have been reiterated and elaborated upon in most of the essays, addresses and reports which have followed the Boston memorial, and, in accordance with them, the legislation

adverse to usury laws in this country has been obtained. It seems to be the decided opinion of the enemies of usury laws everywhere that the merchant or manufacturer, with his eyes open, provided he be neither a minor, of weak mind, under duress or circumvented by fraud, is as competent as the Legislature to judge whether or not it will be to his advantage to borrow at the rate of ten or twelve or a greater per cent; for if he is deemed incompetent, in perfect freedom, to borrow on fair terms, and liable to be imposed upon, owing to the pressure and urgency of his necessities, how, it is asked, can he be deemed more competent (the same causes operating) to sell either his goods, his life estate, his lease hold, his reversion, to bargain for the giving a *post obit* bond, or granting an annuity? Yet, it is said, the law, in its kindness, precludes him from borrowing on what it deems disadvantageous terms, but cannot prevent his selling his property on any terms, however usurious, though any one knows that the loss he would sustain in borrowing at an increased rate of interest may bear but a small proportion to what he might suffer by a forced sale.

These arguments appear plausible, but some of them are more plausible than real. It seems to be assumed that the loan of money is the same in principle as the loan of anything else, and that the one should be as untrammelled as the other; while the fact is, that money is an article distinguishable from merchantable commodities generally, and is not subject to the same rules which govern them, and every day's observation shows that men are always less liable to be impelled by their necessities to agree to pay an exorbitant price for an article of property than for the use of money. Dr. Johnson maintained that usury laws were as necessary for the protection of lenders as for borrowers; that the former were benefited by the removal of the temptation afforded by the prospect of extravagant interest to lend on insufficient security, and there is much in the idea.

But it is said, and, in fact, truly, that usury laws are vestiges of the times when the principles of commercial polity were wholly unknown; when the Legislature extended its interference with the rights of individuals to almost every act of private life; when the prices of bread, cloth, leather, wine and other necessities of life were fixed by statutes. It does not follow, however, that because these laws first originated in the days of political darkness, when numberless legal abuses also had their origin, they

should *therefore* be expunged from the statute books. On the contrary, it is contended by many great and good men, that, *because* the usury laws have been hallowed by the wisdom and experience of our ancestors, they ought not to be abolished.

The venerable and learned commentator upon American law, the late Chancellor Kent, in a very lucid opinion which he gave in a usury case then before the Court of Errors of the State of New York, an able extract from which is given in a previous chapter (*vide ante*, ch. 2.), after examining the subject at considerable length, and referring to the history of the laws against usury from the earliest periods, asks: "Can we suppose that a principle of moral restraint, of such uniform and universal adoption, has no good sense in it? Is it altogether the result of monkish prejudice? Ought we not rather to conclude that the provision is adapted to the necessities and the wants of our species, and grows out of the natural infirmity of men, and the temptation to abuse inherent in pecuniary loans?" He then proceeds: "The question of interest arises constantly, and intrudes itself into almost every transaction. It stimulates the cupidity for gain, and sensibly affects the heart, and gradually presses upon the relation of debtor and creditor. Civil government is continually placing guards over the weaknesses, and checks upon the passions of men; and many cases might be mentioned, in which there is, equally with usury laws, an interference of the lawgiver with the natural liberty of mankind to deal as they please with each other. But no person doubts of the necessity and salutary efficacy of such checks. On the same principle, that unlimited usury may be permitted, the law ought to allow the creditor to insert in his bond a provision for compound interest whenever the stipulated interest becomes due and is not paid. Nay, parties ought to be allowed to agree that if the condition of a bond be not performed at the day, the penalty shall not only be nominally forfeited, but literally exacted. I should apprehend that if these things were to be permitted, there would not be strength enough in the government to support the administration of justice. It is an idle dream to suppose that we are wiser and better than the rest of mankind. Such doctrines may be taught by those who find it convenient to flatter popular prejudice; but the records of our courts are daily teaching us a lesson of more humility. And, I apprehend, it would be perilous in the extreme to throw aside all the existing

checks upon usurious extortion, and abolish or traduce a law which is founded on the accumulated experience of every age.

“The Roman commonwealth, if we may place reliance upon its entire history, tried every experiment on this interesting subject. The Romans had no law regulating the interest of money, and left parties to their own contracts, until the law of the Twelve Tables, according to Tacitus, or the law of the tribunes, in the year of Rome 398, according to Montesquieu. The consequence was, unending quarrels between the patricians and plebeians, and popular secessions to the *mons sacer*, in which one party pleaded the obligation, and the other the severity, of their contracts. Interest was then reduced to the smallest allowance, and finally abolished, which led to a still more frightful usury, until, at last, the emperors were obliged to allow, but regulate and limit, the charge of usury. So true it is, according to the President Montesquieu (*Esprit des Loix*, liv. 22, ch. 21, 22), who has discussed this subject at large, that extreme laws produce extreme evil; *les loix extrêmes dans le bien font valtre le mal extrême*. The Romans, at one time, had no laws against usury, and, at another time, they allowed no interest; and these are the extreme laws which this celebrated civilian condemns.

“Lord Redesdale said, in 1803 (1 *Sch. & Lef.*, 195, 312), many years after Jeremy Bentham, to whom the learned counsel referred for an able defense of usury, had first published his letters, that the statute of usury was founded on great principles of public policy. It was intended, he said, to protect distressed men, by facilitating the means of procuring money on reasonable terms, and by refusing to men who sit idle as high a rate of interest, without hazard, as those can procure who employ money in hazardous undertakings of trade and manufactures. I trust that theoretic reformers have not yet attained, on this subject, any decided victory over public opinion. Mr. Bentham contends that we ought not so much as to wish ‘to see the spirit of project in any degree repressed.’ It may be so; but I hope I may be permitted to wish that the first experiments of his projects may not be made within these walls. The statute of usury is constantly interposing its warning voice between the creditor and the debtor, even in their most secret and dangerous negotiations, and teaches a lesson of moderation to the one, and offers its protecting arm to the other. I am not willing to withdraw such a sentinel. I have been called to witness, in the

course of my official life, too many victims to the weakness and to the inflamed passions of men" (*Dunham v. Gould*, 16 *Johns. R.*, 367, 378-380).

The venerable chancellor is regarded as very competent authority upon the question here discussed. His sagacity and great learning particularly fitted him not only to give a true exposition of any given enactment, but to judge of the necessity and propriety of the enactment itself. From this opinion, it is quite clear that, in the judgment of this eminent jurist, the same necessity existed in his day for usury laws as that which called for them in earlier times, and that he did not sympathize with the sentiment that such checks are prejudicial to the exercise of enterprise, or stumbling-blocks in the way of commercial advancement. And it may be added, that, in most cases, the objections to these laws emanate from money-lenders themselves, and they are usually most prominent in making efforts to obtain their repeal; and, further, that it is the daily observation of every discerning business man, that no person can continue for any considerable length of time in any legitimate calling who is in the constant habit of borrowing, money at exorbitant interest; his failure is a foregone conclusion, and it is only a question of time. The probabilities, therefore, are, that these legal restraints will still be continued in many, or most, of the American States, and that the time is, at least, far distant, when the system will be permanently abandoned.

CHAPTER V.

THE STATUTES IN FORCE IN RESPECT TO INTEREST AND USURY IN THE STATES OF NEW YORK, VERMONT, NEW HAMPSHIRE, MAINE, MASSACHUSETTS, RHODE ISLAND, CONNECTICUT, NEW JERSEY, DELAWARE, PENNSYLVANIA, OHIO AND MICHIGAN — TABLE OF THE RATES OF INTEREST IN THOSE STATES RESPECTIVELY.

USURY, as at present understood, is unknown to the common law, and depends wholly upon statutory enactment.* It becomes

* It was the opinion of Plowden, who wrote in the sixteenth century, that usury exists at common law, notwithstanding the statute upon the subject. He says: "Where a statute or act of Parliament is made concerning any point of common law, the common law concerning this point is changed, altered or affected by the statute so far, only, as the statute expressly goes.

necessary, therefore, before entering upon the general discussion, to examine the statutes of the several States upon the subject. Formerly the taking of usury was regarded as a heinous offense, and almost all of the States had statutes calculated to suppress it; many of them penal in their nature and others remedial. But for many years the theory has been gaining ground that money, like merchandise, should be regulated by the market, and even now many of the States have no usury laws at all, and in those States in which such laws exist they are quite various; and scarcely any two of them are precisely alike. Those States which are now understood to have statutes to suppress usury are Alabama, Delaware, Illinois, Iowa, Kansas, Louisiana, Missouri, New Jersey, New York, North Carolina, Virginia and Wisconsin; while in Pennsylvania, Michigan, Mississippi and a few others of the States, the rate of interest is prescribed, with a provision that, if more is agreed to be taken, the excess shall be forfeited. In most of the remaining States the parties are left to regulate the subject at discretion, by agreement, with a statute fixing the rate when no agreement is made, that is to say, after the principal becomes due. Perhaps the most stringent enactments to prohibit usury are those in force in the State of New York. In this State, the provisions of the statute are as follows: The rate of interest upon the loan or forbearance of any money, goods or things in action is fixed at seven dollars upon \$100 for one year, and after that rate for a greater or less sum, or for a longer or shorter time. No person or corporation is permitted, directly or indirectly, to take or receive in money, goods or things in action, or in any other way, any greater sum or greater value, for the loan or forbearance of any money, goods or things in action, than is before prescribed. And every person who shall pay or deliver any greater sum or rate than is prescribed, or his personal representatives, may recover such excess in an action against the person taking or receiving the same, or his personal representatives, provided the action be brought within one year after such payment or delivery. If such action be not

So, when an act of Parliament inflicts a new punishment for an old offense at common law, it still remains an offense, and punishable at common law, as it was before the act passed." He admits, however, that the authority of Lord Coke is the other way, but insists that his opinions do not claim universal submission, and adds: "It is with the greatest diffidence that I venture to suggest that, in this instance, I feel under the necessity of withdrawing my assent to the opinion of that great man" (*Plow. Usury*, 61). But it has long since been abundantly settled by the highest judicial authority that usury is illegal only as it is made so by statute.

brought within the said year, and prosecuted with effect, then the said excess may be sued for, and recovered with costs, at any time within three years after the said one year, by any overseer of the poor of the town where such payment may have been made, or by any county superintendent of the poor of the county in which the payment may have been made.

All bonds, bills, notes, assurances, conveyances, all other contracts or securities whatsoever (except bottomry and respondentia bonds and contracts), and all deposits of goods or other things, whereupon or whereby there shall be received or taken or secured, or agreed to be received or taken, any greater sum or value, for the loan or forbearance of any money, goods or things in action, than is prescribed as aforesaid, are declared void. And every person offending against the foregoing provisions of the statute may be compelled to answer on oath any bill that may be exhibited against him in a court of equity for the discovery of any sum of money, goods or things in action so taken, accepted or received, in violation of the provisions of the statute, or either of them. Every person who shall discover and repay or return the money, goods or other things so taken, accepted or received, or the value thereof, will be acquitted and discharged from any other or further forfeiture, penalty or punishment which he may have incurred by taking or receiving the money, goods or other things so discovered and repaid, or returned. And it is further provided that whenever any borrower of any money, goods or things in action shall bring his suit in equity for discovery as aforesaid, it shall not be necessary for him to pay or offer to pay any interest whatever on the sum or thing loaned, nor can any court of equity require or compel the payment or deposit of the principal sum, or any part thereof, as a condition of granting relief to the borrower, in any case of a usurious loan forbidden by the statute (1 *R. S.*, 771, §§ 1-8; 1 *Stat. at Large*, 725-727; 4 *ib.*, 450).

For the purpose of calculating interest, the statute provides that a month shall be considered the twelfth part of a year, and as consisting of thirty days; and interest for any number of days less than a month shall be estimated by the proportion which such number of days shall bear to thirty; and whenever, in any statute, act, deed, contract or instrument, any certain rate of interest is mentioned, and no period of time is stated for which such rate is to be calculated, interest must be calculated at the rate mentioned,

by the year, in the same manner as if the words "per annum," or "by the year," had been added to such rate (1 *R. S.*, 773, §§ 9, 10; 1 *Stat. at Large*, 727). The statute, however, provides that no corporation shall interpose the defense of usury in any action (*Laws of 1850, ch. 172*; 3 *Stat. at Large*, 681). The section of the statute which renders void bonds, bills, notes, etc., for usury, as it was originally passed and incorporated into the Revised Statutes of 1830, contained this reservation: "But this section shall not extend to any bills of exchange or promissory notes payable to order or bearer, in the hands of an indorsee or holder, who shall have received the same in good faith and for valuable consideration, and who had not, at the time of discounting said bill or note, or paying such consideration for the same, actual notice that such bill or note had been originally given for a usurious consideration, or upon a usurious contract." But it was very soon discovered that this reservation entirely defeated the object of the statute, and that, in point of fact, the practice of usury was more common and more oppressive than before the passage of the act; and, therefore, in 1837, the Legislature repealed the objectionable reservation. The act of 1837 further provides that whenever it shall satisfactorily appear, by the admissions of the defendant or by proof, that any bond, bill, note, assurance, pledge, conveyance, contract, security or any evidence of debt has been taken or received in violation of the provisions of said title or of this act, a court of equity may declare the same to be void, and enjoin any prosecution thereon, and order the same to be surrendered and canceled. The act also declares that any person who shall, directly or indirectly, receive any greater interest, discount or consideration than is prescribed by the statute, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by fine, not exceeding \$1,000, or imprisonment, not exceeding six months, or both; and makes it the duty of all courts of justice to charge the grand jury especially to inquire into any violation of the provisions of the act. And the statute contains the further provision, that every plaintiff examined as a witness pursuant to the act, or any defendant under the same, who shall swear falsely, shall, upon conviction thereof, suffer the pains and penalties of willful and corrupt perjury; but the testimony given by any plaintiff, or the answer of any defendant, made pursuant to the statute, cannot be used against such person before any grand jury, or on the trial of

any indictment against such person (*Laws of 1837, ch. 430; 4 Stat. at Large, 459, 460*).

These are the provisions of the statutes of New York for the prevention of usury, at present in force. It will be observed that the provision which declares the contract or instrument void for usury is different in its phraseology from that which declares the *taking* of usury a misdemeanor. In the former case, the agreement to take usury renders the transaction void, while in the latter it requires both the *agreement* to take, and the *actual taking* usury, to constitute the offense.

By the statutes of the State of Vermont, no person can legally take, directly or indirectly, more than six per cent interest for the forbearance of money; and, whenever a greater rate of interest shall have been paid, the person paying the same may recover back the amount so paid above legal interest, with interest thereon from the time of payment. In case the excess of interest only has been paid, or the same may have been included in the security for the loan, and an action be brought for the recovery of the loan, and the usury be pleaded as a defense, such excess may be allowed and deducted in the assessment of damages.

And in the State of New Hampshire, the statute provides that the legal rate of interest shall be six per cent, and that whoever shall receive more than the legal rate shall forfeit three times the excess to the person who shall prosecute for the same; but no transaction is rendered void or voidable by reason of usury. The consequences resulting from usurious transactions in this State, are not as serious as in some of the States, and yet they are sufficiently so to make it important to understand the distinction between what is and what is not usury.

In the States of Maine and Massachusetts the legal rate of interest is six per cent, unless the parties stipulate in writing for a different rate, in which case the same may be recovered; in other words, there is no law against usury in these two States, and the parties are left free to agree in writing for any rate of interest, and the agreement will be binding. And the statutes of Rhode Island upon the subject are substantially the same.

In the State of Connecticut, the statute forbids the taking of more than six per cent interest for the use of money, or goods; or any property whatever, and any person who shall take illegal interest forfeits such excess, one-half to him who shall sue there-

for and prosecute his suit to effect, and the other half to the treasury of the State. And all contracts reserving more than legal interest are declared void as to the whole interest, and in any action brought upon the contract the amount of the original loan without interest can only be recovered. If the illegal interest has been paid upon the usurious contract, the same will be deducted from the amount loaned; and in every action upon an alleged usurious contract the defendant may set up the usury, when the plaintiff may be made to testify, and the court will adjudicate the matter. But contracts to pay taxes and insurance upon the sum loaned, or upon the estate mortgaged to secure the same, are in no case to be deemed usurious. And interest cast according to Rowlet's tables is declared not to be usurious (*Gen. Stat. 1866, tit. 66*).*

In New Jersey, parties are forbidden to take more than seven per cent interest on money or property loaned; and all notes, bills, bonds, mortgages, contracts, covenants, conveyances and assurances, on which a higher rate shall be received or taken, are declared utterly void. Any borrower of money, etc., may exhibit his bill in chancery against the lender, and compel him or her to discover whether there was any usury in the transaction, and if the court find that there was, the lender will be obliged to accept the amount of the original loan without interest, and pay the costs of suit; provided that the bill be exhibited before any suit shall have been instituted to recover the penalty provided in case of illegal brokerage. But no bond, mortgage or other security for the payment of money, issued by a railroad or canal corporation under the laws of the State, will be deemed invalid because the same may be sold or assigned by such corporation below the par value thereof, provided the same be valid on its face (*Nixon's Dig. of 1868, pp. 437, 439*).

In the State of Delaware, the legal rate of interest is fixed at six per cent, and any person taking, directly or indirectly, more than the legal rate for the loan or use of money, is subject to for-

* Since this chapter was in manuscript, and during the session of 1872, the Legislature of Connecticut passed an act absolutely repealing all usury laws in the State, and authorizing any contract in writing for the payment of interest. And where there is no stipulation in the writing in respect to the rate of interest, the present statute leaves the rate at six per cent. The late law, however, is retained in the text, as it may be convenient for reference in connection with some of the authorities cited from the courts of that State.

feit and pay, to any person who will sue for the same, a sum equal to the money lent, one-half for the use of the person so suing, and the other half for the use of the State (*Revised Code of 1852, ch. 63, § 1*).

In Pennsylvania, the rate of interest as fixed by statute is six per cent, with some exceptional cases specially provided for. Usurious interest can in no case be collected, and when the same may have been voluntarily paid, it can be recovered back; but the action therefor must be commenced within six months from the time of payment, or it will be barred. Negotiable paper, which has been received *bona fide* in the ordinary course of business, cannot be impeached for usury; that is to say, the payment of negotiable paper in the hands of a *bona fide* holder cannot be avoided as to either principal or interest, even though it may have been usurious in its inception (*Purden's Dig., 1862, p. 561*).

In the State of Ohio, the legal rate of interest is six per cent, although the parties may agree upon a higher rate, not exceeding eight per cent, and the same can be enforced. If the contract is usurious, that is, if it reserves interest at a higher rate than is allowed by the statute, the same can only be enforced for the principal and interest at six per cent. And in the State of Michigan, the legal rate of interest, in the absence of express agreement upon the subject, is seven per cent; but the parties may agree in writing for the payment of a higher rate, not exceeding ten per cent. Contracts for the payment of usurious interest can only be enforced for the principal and legal interest, the excess only being forfeited. Negotiable paper in the hands of a *bona fide* holder, to whom it has been sold, is collectible for the whole amount received, principal and interest.

To repeat the rates of interest in the several States considered: the rate in New York is seven per cent, in Vermont six per cent, in New Hampshire six per cent, in Maine, Massachusetts, Connecticut and Rhode Island six per cent; but parties may contract in writing for any rate; in New Jersey seven per cent, in Delaware and Pennsylvania six per cent, in Ohio six per cent, or a higher rate by agreement of the parties, not to exceed eight per cent, and in Michigan seven per cent, with the right to the parties to agree upon a higher rate, not exceeding ten per cent.

CHAPTER VI.

THE STATUTES IN FORCE IN RESPECT TO INTEREST AND USURY IN THE REMAINING STATES OF MARYLAND, VIRGINIA, WEST VIRGINIA, NORTH CAROLINA, SOUTH CAROLINA, GEORGIA, FLORIDA, ALABAMA, MISSISSIPPI, TENNESSEE, LOUISIANA, ARKANSAS, TEXAS, CALIFORNIA, OREGON, NEVADA, NEBRASKA, KANSAS, MISSOURI, IOWA, MINNESOTA, WISCONSIN, ILLINOIS, INDIANA AND KENTUCKY — FEDERAL STATUTE ON THE SUBJECT FOR NATIONAL BANKS — TABLE OF THE RATES OF INTEREST IN THOSE STATES CONSIDERED IN THIS CHAPTER.

In the State of Maryland, the rate of interest established by law is six per centum per annum, and any person exacting, directly or indirectly, for a loan of money, goods or chattels, to be paid in money, above that rate, is deemed guilty of usury; but no plea of usury is available against any legal or equitable assignee or holder of any bond, bill obligatory, bill of exchange, promissory note or other negotiable instrument, when such assignee or indorsee or holder shall have received the same for a *bona fide* and legal consideration, without notice of any usury in the creation or subsequent assignment thereof. Any person guilty of usury forfeits the excess above the real sum or value of the goods and chattels actually lent or advanced, and the legal interest on such sum or value, which forfeiture inures to the benefit of the defendant who shall plead and prove such usury; and every plea of usury must state the sum of money or the value of the property actually lent or advanced, and the legal interest on the same, and the plaintiff may recover such sum or value, with legal interest from the time it was lent or advanced (1 *Md. Code*, Art. 95, §§ 1-5).

In Virginia, the rate of interest is six per centum per annum, and no person upon any contract is permitted to take for the loan or forbearance of money or other thing above the value of that rate, and all contracts or assurances made directly or indirectly for the loan or forbearance of money or other thing at a greater rate are declared to be void. Usury may be pleaded in general terms, and the plaintiff may reply generally, under which the parties may give any evidence which would be proper if the pleadings were special. Any borrower may bring an action in equity against the lender, to discover if there be wrong

in the transaction, in which the defendant will be compelled to discover, on oath, the facts of the case, and if it appears that more than legal interest was reserved, the lender can only recover the principal money, or other thing, without interest, and will be compelled to pay the costs of the suit. Any excess of interest which may be paid in any case may be recovered back, provided an action be brought therefor within one year after the same was paid. Any judgment creditor who apprehends that he is in danger of loss by reason of usurious dealings on the part of his debtor, may exhibit his bill in equity against the party dealing with such debtor, and compel him to discover, on oath, all the facts, and if it appear that more than legal interest has been received, the excess, or so much thereof as may be necessary, must be applied to the satisfaction of the plaintiff's demand, provided that the bill must be filed within five years after the receipt of the illegal interest. If any person shall take, for the loan or forbearance of money or other thing, interest above the legal rate, he will forfeit double the value of such money or thing, one moiety of which will go to the informer (*Code of 1860, ch. 141*). It will be observed that, in case of usury, the excess only is forfeited when the proceedings are in equity, but if at law, the whole principal and interest are forfeited. The statute of Virginia also provides that usury shall not be pleaded, in any case, by an incorporated company (*Code of 1860, ch. 57, § 38*).

In the State of West Virginia, the legal rate of interest is declared by statute to be six per cent, and all contracts to pay more than this rate are void as to the excess, and no further. In an action upon an alleged usurious contract, the defendant may plead, in general terms, that the same is usurious, and under this plea he may prove the usury, and the borrower may exhibit his bill against the lender, setting up usury in a given transaction, and thereby compel the lender to discover the facts; and if it appear that more than legal interest was reserved, judgment will be entered in favor of such lender for the amount of the principal and legal interest, but without costs (*Code of 1868, ch. 96*).

In the State of North Carolina, the legal rate of interest for money or property loaned is fixed at six per cent, and persons taking more than the legal rate will forfeit double the value forborne. The statute also provides that all bonds, contracts and assurances whatever, for the payment of any principal or money

lent or covenanted to be performed, upon or for any usury, whereupon or whereby illegal interest shall be reserved, shall be void; and any person who, upon any contract, shall take or receive illegal interest, will forfeit and lose, for every such offense, the double value of the moneys or property lent, bargained or exchanged; the one moiety to the State, and the other to him who will sue for the same (*Rev. Code of 1855, ch. 114*).

In Alabama, the rate of interest upon the loan or forbearance of money, things in action or goods, is eight per cent; and all contracts for the payment of interest at a higher rate can be enforced only for the principal, and if any interest has been paid, it must be deducted from the principal, and a judgment rendered for the balance only. All change bills and notes for a sum not exceeding one dollar, issued or circulated in the State, without authority of law, bear interest at the rate of one hundred per cent (*Rev. Code of 1867, part 2, title 3, ch. 2, p. 406*).

In Alabama, where usury is relied on as a defense, the representative of the borrower is a competent witness to prove usury by his belief, provided he has given ten days' notice to the plaintiff, or his attorney, of his intention to do so; that is to say, unless the plaintiff, being the lender, denies, on oath in open court, the truth of the facts proposed to be sworn to by the defendant (*Rev. Code, § 2715*). And in any action, if it be made to appear that usurious interest has been intentionally taken or reserved, the defendant recovers full costs (*Rev. Code, § 2781*).

In the State of Louisiana, all debts bear interest at the rate of five per cent, unless otherwise stipulated. Conventional interest can in no case exceed eight per cent, under pain of forfeiture of the entire interest contracted; and if any person shall pay on any contract a higher rate of interest than is allowed by law, either as discount or otherwise, the same may be sued for and recovered within twelve months from the time of such payment. Bankers and banking corporations are entitled to charge and receive discount at a rate not greater than the maximum allowed by law on conventional obligations; and their other contracts are regulated by the same laws in regard to interest as are applicable to the contracts of individuals. The owner of any promissory note, bond or written obligation may collect the same, notwithstanding it may include a greater rate of interest or discount than

eight per cent, although after maturity the same can only bear interest at eight per cent (*Rev. Stat.* 1870, §§ 1883-1889).

In Missouri, where no rate of interest is agreed upon, the rate is fixed at six per cent, but parties may agree in writing for the payment of interest, not exceeding ten per cent, on money due or to become due on contract. Persons are prohibited from taking any more or greater interest than these rates; and when usury is pleaded, and the proof sustains the defense, judgment will be given for the principal and ten per cent interest, but an order will be made that the whole amount of interest be set apart for the use of the common schools of the county in which the suit may be brought. Interest may be paid on interest, but it may not be compounded oftener than once a year (*Gen. Stat. of* 1866, *ch.* 89).

In the State of Kansas, the rate of interest is fixed at seven per cent, unless a different rate is agreed upon between the parties; but parties to any bond, bill, promissory note or other instrument in writing for the payment or forbearance of money, may stipulate therein for a rate of interest not exceeding twelve per cent. Payment of usurious interest, whether made in advance or not, will be deemed payment of principal; and persons contracting for illegal interest will forfeit the entire interest, and will not be permitted to recover any more than the original principal (*Gen. Stat. of* 1868, *ch.* 51, *as amended by Laws of* 1871, *ch.* 95).

In Nebraska, the legal rate of interest upon the loan, or forbearance of money, goods or things in action, is fixed at ten per cent, unless a greater rate, not exceeding twelve per cent, be contracted for by the parties. If a greater rate of interest than is provided by law be contracted for or received, or reserved, and an action is brought on the contract, proof may be made of the illegal interest, and when the fact is proved, only the principal can be recovered, without interest, and the defendant will recover costs; and if the interest has been paid, the same will be deducted from the principal and the judgment entered for the balance. Any person charged with taking illegal interest may be required to answer on oath concerning it, and relief to a complainant, in case of a usurious loan, may be given without payment or tender by him of the principal sum (*Rev. Stat. of* 1866, *ch.* 28, *as amended by Laws of* 1867, *p.* 8).

In Iowa, the rate of interest is six per cent, unless the parties

agree in writing, which they may legally do, for a different rate, not exceeding ten per cent. The taking of any greater interest than is allowed by law is expressly prohibited, upon a penalty of the forfeiture of ten per cent upon the contract to the school fund of the county where the suit is brought. And the *bona fide* assignee of a usurious contract may recover of the usurer the full amount of the consideration paid by him for such contract, less the amount of the principal money loaned or due (*Rev. Laws of 1860, ch. 72*).

In the State of Illinois, the rate of interest is fixed at six per cent, unless the parties otherwise agree, which they may do, for the payment of interest not exceeding ten per cent. If illegal interest be contracted for, the whole interest will be forfeited, and only the principal sum due can be recovered. Contracts made payable in any other State or Territory, or in the city of London, England, may be for the payment of interest according to the laws of the place where they are made payable, and the same may be fixed at the legal rate in Illinois (*Gen. Stat. of 1869, ch. 54*).

In Wisconsin, the legal rate of interest upon the loan or forbearance of money, goods or things in action is seven per cent, except that the parties may contract for a greater rate, not exceeding twelve per cent; and any person paying a greater interest than the law allows may recover, of the person who took or received the same, treble the amount of the excess of interest paid. Only the principal, without any interest, can be recovered in an action upon any bond, bill, note, assurance, conveyance or other contract or instrument, whereby there shall be reserved a rate of interest exceeding twelve per cent. Any person violating the law in respect to taking interest may be compelled to answer on oath respecting the same; but no person can avail himself of the benefit of the law against usury, unless he first tender the principal sum loaned to the party entitled to the same (*Rev. Stat. 1858, ch. 61*).

In the State of Oregon, the rate of interest is fixed at ten per cent, and persons are prohibited from taking more, except that the parties to any contract may agree for the payment of interest at the rate of one per cent per month, when the same may be reserved. If it be ascertained, in any action upon any contract, that illegal interest has been contracted for, the entire debt contracted is forfeited to the school fund of the county where the suit is brought,

and a judgment will be rendered against the defendant for the original sum loaned, or debt contracted, in favor of the State, for the use of the common school fund of such county, and against the plaintiff for costs. But a *bona fide* assignee of the usurious contract may recover of the usurer the full amount paid by him for such contract, provided such assignee had no notice of the usury (*Gen. Laws, 1845-1867, ch. 24*).

In the remaining States, where usury laws exist, the consequences of usury are not serious. In South Carolina, the legal rate of interest is seven per cent, but the parties may contract for any rate without limit. In Georgia, the legal rate of interest is fixed at seven per cent, and no more can be collected, if agreed to be paid. In Florida, the rate of interest, in the absence of any contract on the subject, is eight per cent, but the parties may agree upon any rate of interest, and the contract can be enforced. In Mississippi, the rate of interest on debts is six per cent, and on lent money eight per cent; but it is competent for the parties to stipulate in writing for a higher rate, not exceeding ten per cent, and, if usurious interest be reserved, the excess over the legal rate is forfeited. In Tennessee, the legal rate of interest is six per cent, unless the parties stipulate for a higher rate, which it is competent for them to do, but not to exceed ten per cent; if more be reserved, the excess is forfeited. In Arkansas, in the absence of any agreement on the subject, the rate of interest is six per cent, and it is forbidden by the State Constitution that any law shall be passed to limit the rate of interest at which the parties shall agree; that is to say, the parties may agree upon any rate to be paid. In Texas, the State Constitution on the subject of interest is similar to that of Arkansas; but the legal rate of interest, in the absence of agreement, is fixed at eight per cent. In California, the legal rate of interest is fixed at ten per cent, but it is competent for the parties to agree in writing for the payment of any rate. In Nevada, the law upon the subject of interest is the same as in California. In Indiana, the legal rate of interest is fixed at six per cent, unless the parties stipulate in writing for a different rate, which they are at liberty to do, but not exceeding ten per cent; if above the rate of ten per cent be agreed upon, the excess cannot be collected. In Kentucky, the legal rate of interest is six per cent, and a contract to pay more is simply void as to the excess. In Minnesota, in the absence of agreement, the statute rate of interest is seven

per cent; but it is competent for the parties to agree in writing for a higher rate, not exceeding twelve per cent; nothing above that rate can be enforced.

This statement would not be complete without a reference to the federal statute in respect to the rate of interest to be taken by the national banks organized under that act. The statute provides that every such banking association may take, receive, reserve and charge on any loan or discount such interest as is allowed by the laws of the State or Territory where the bank is located, and no more; except that where by the laws of any State a different rate is limited for banks of issue organized under State laws, the rate so limited shall be allowed for associations organized in any such State under the said federal act. And when no rate is fixed by the laws of the State or Territory, the bank may take, receive, reserve or charge a rate not exceeding seven per centum, and such interest may be taken in advance, reckoning the days for which the note, bill or other evidence of debt has to run. And the knowingly taking, receiving, reserving or charging a rate of interest greater than aforesaid is to be held and adjudged a forfeiture of the entire interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon. And in case a greater rate of interest has been paid, the person or persons paying the same, or their legal representatives, may recover back, in an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same, provided that the action therefor is commenced within two years from the time the usurious transaction occurred. But the purchase, discount or sale of a *bona fide* bill of exchange, payable at another place than the place of such purchase, discount or sale, at not more than the current rate of exchange for sight drafts, in addition to the interest, is not to be considered as taking or receiving a greater rate of interest (*Vide 2 Bright. Dig. U. S. Laws, p. 64, § 30*).

And now, to repeat for convenience the rates of interest in the several States considered in this chapter: The rate in Maryland, Virginia, West Virginia, North Carolina, Mississippi, Tennessee, Arkansas, Missouri, Iowa, Illinois, Indiana and Kentucky is six per cent; in South Carolina, Georgia, Kansas and Minnesota, seven per cent; in Louisiana, five per cent; in Florida, Alabama and Texas, eight per cent; and in California, Oregon, Nevada and Nebraska, ten per cent. In one respect, all the statutes upon

usury are in substantially the same language. They are negative, prohibiting any interest being taken above a certain rate; they are none of them affirmative; they do not declare in what cases interest shall be taken; much less do they in any case require it to be paid. So that it may be affirmed that neither by common law nor by statute is a party in any case required to pay interest. And it follows inevitably and irresistibly, upon the universal principle of all law, that a man cannot be made legally liable to pay interest, as such, without his own agreement to that effect. All that the statutes do is to prescribe the rate of interest and provide the consequences for undertaking to obtain more than the legal rate.

The provisions of the statutes relating to usury in the different States having thus been detailed, and varient as they are in many essential particulars, it becomes an important inquiry as to the true interpretation to be given to those several acts, and the cases which may be considered within the pale of such acts, as well as those transactions which the courts have decided not to be tainted with the vice of usury.

CHAPTER VII.

OF THE PARTICULAR STATUTES TO BE APPLIED IN CASES OF ALLEGED USURY — CONFLICT OF LAWS ON THE SUBJECT — RULES BY WHICH THE QUESTION IS DETERMINED.

BEFORE entering upon the general discussion of the interpretation to be given to the statutes of the different States against usury, and the principles which apply to cases of usury under those statutes, it becomes necessary to examine an important question which we meet at the very threshold of the discussion, viz.: which of the State laws are to govern in these cases of usury; that is, when the alleged usurious transaction was entered into in one State and the same is to be performed in another, under the statute of which State is the case to be determined? In order to obtain a correct understanding of the question, it is necessary to refer briefly to the law of nations, and more particularly to that branch of international jurisprudence relating to the conflict of laws in matters of contract.

Now, the law of nations is the science which teaches the rights subsisting between nations or States and the obligations correspondent to those rights; and it has been said that, in cases of doubt arising upon what is the law of nations, it is now an admitted rule amongst all European nations that our common religion, *Christianity*, pointing out the principles of *natural justice*, should be equally appealed to and observed by us as an unfailing rule of construction. A nation or a State is a body politic, or a society of men bound together for the purpose of promoting their mutual safety and advantage by their combined strength. Every nation that governs itself, under what form soever, without dependence on any foreign power, is a *sovereign State*, and its rights are virtually the same as those of any other State. To give a nation a right to make an immediate figure in this grand society, it is sufficient that it be really sovereign and independent; that is, that it govern itself by its own authority and laws. Every sovereign State owes certain obligations to itself, and at the same time it is under certain well-defined obligations to sustain nations and States; and among others, it is the duty of every State to recognize the laws of a sister State, and, under certain general principles, to give them force and effect.

It may be laid down as a general rule, that the validity of a contract is to be decided by the law of the State where it was made, unless by its terms it is to be performed in another State, in which case the law of the State in which it is to be performed is to govern; that is to say, when the contract is, either expressly or tacitly, to be performed in any other State than the one where it was entered into, the general rule is in conformity to the presumed intention of the parties, that the contract, as to its validity, nature, obligation and interpretation, is to be governed by the law of the place of performance (*Story's Conflict of Laws*, § 280). This rule has been fully recognized by the Supreme Court of the United States, and, indeed, in some cases where the question of usury was involved. Said Chief Justice Taney: "The general principle in relation to contracts made in one place, to be executed in another, is well settled. They are to be governed by the law of the place of performance" (*Andrews v. Pond*, 13 *Peters' R.*, 65, 78). And in another very important case he said: "It is needless to enumerate here the instances in which, by the general practice of civilized countries, the laws of the one, will, by the

comity of nations, be recognized and executed in another, where the rights of individuals are concerned. The cases of contracts made in a foreign country are familiar examples; and courts of justice have always expounded and executed them according to the law of the place in which they were made; provided that that law was not repugnant to the law or policy of their own country. The comity thus extended to other nations is no impeachment of sovereignty. It is the voluntary act of the nation by which it is offered; and is inadmissible when contrary to its policy or prejudicial to its interests. But it contributes so largely to promote justice between individuals, and to produce a friendly intercourse between the sovereignties to which they belong, that courts of justice have continually acted upon it, as a part of the voluntary law of nations" (*Bank of Augusta v. Earle*, 13 *Peters' R.*, 519, 589). This language applies more particularly to *foreign nations*, but the chief justice furthermore declares that these same rules of comity apply to the States of the Union as well, saying: "The intimate union of these States, as members of the same great political family, the deep and vital interest which binds them so closely together, should lead us, in the absence of proof to the contrary, to presume a greater degree of comity and friendship and kindness towards one another than we should be authorized to presume between foreign nations." The rule laid down in this case applies only where the performance of the contract is to be the place where it was made. In such cases the contract will be enforced in conformity to the law of the State in which it was made, whether the action is brought to enforce it in that State or in another; and some jurists have maintained that the same rule would apply, although the contract is to be performed in another State. But Lord Mansfield stated the doctrine to the contrary many years ago: "The law of the place can never be the rule, where the transaction is entered into with an express view to the law of another country as the rule by which it is to be governed" (*Robinson v. Bland*, 2 *Burr. R.*, 1077, 1078). This is the general rule, and it has been uniformly adopted in this country and in England. The doctrine of the *lex loci contractus* is succinctly and accurately given by the late Judge Cowen in a note to one of the cases reported by him. He says: "The general proposition upon this head will be found in almost all the cases from which I shall extract the point decided; but it is more

generally laid down and supported as follows : That the law of a place where a contract is made, or to be performed, is to govern as to the *nature, validity, construction* and *effect* of such contract ; that being valid in such place, it is to be considered equally valid, and to be enforced, everywhere, with the exception of cases in which the contract is immoral or unjust, or in which the enforcing it in a State would be injurious to the rights, the interest or convenience of such State or its citizens ; and, on the contrary, if a contract be void, or be discharged by the law of the place where it is made or to be performed, it is to be considered as void or discharged everywhere, and to be enforced nowhere. * * * But as the laws of contracts, etc., in foreign States or countries are not admitted *ex propria vigore*, but only *ex comitate*, the judicial power will exercise a discretion with respect to the laws they may be called upon to sanction ; for if they be manifestly unjust, or calculated to injure their own citizens, they ought to be rejected.

* * * Accordingly an exception is, where it would be dangerous, or inconvenient, or of immoral tendency to enforce the foreign contract here " (*Andrews v. Herriot*, 4 *Cow. R.*, 508, 511, 512, note).

In some cases, importance seems to be attached to the circumstance that one or both of the parties were inhabitants of the State or country where the contract was made. But there is, probably, no force to the distinction attempted to be made. The rule upon the subject is, that the law of the place where the contract is made is to control it, unless it appear upon the face of the contract that it was to be performed at some other place, or was made with reference to the laws of some other place ; and the reason of the rule is, not the allegiance due from the contracting parties to the government where the contract is made or is to be executed, but the supposed reference which every contract has to the laws of the State or country where it is made or to be executed, whether the parties are citizens of that State or country or not. But the *lex loci* applies only to the validity or interpretation of contracts, and not to the time, mode or extent of the remedy. And yet the rule is well settled that, when a contract is made with reference to another country in which it is to be executed, it must be governed by the laws of the place where it is to have its effect. But the *lex loci* is to govern, unless the parties had in view a different place, *by the terms of the contract*. To

repeat, then: the general rule established, *ex comitate et jure gentium*, is, that the place where the contract is made, and not where the action is brought, is to be considered in expounding and enforcing the contract, unless the parties have a view to its being executed elsewhere, in which case it is to be considered according to the laws of the place where the contract is to be executed (*Vide Lee v. Selleck*, 33 *N. Y. R.*, 615). This is the doctrine of the authorities, as well as the elementary writers; and it would seem as a general proposition that, from the rule, there would be no difficulty in ordinary cases of alleged usury to determine the statutes under which they are to be decided. But the authorities are numerous in respect to the precise question of intent; and the doctrine is, that it is to be governed by the *lex loci*, in conformity to the general rule. Said Chief Justice Taney: "The general principle in relation to contracts made in one place, to be executed in another, is well settled. They are to be governed by the law of the place of performance, and if the interest allowed by the laws of the place of performance is higher than that permitted at the place of the contract, the parties may stipulate for the higher interest without incurring the penalties of usury." And from the whole case the learned reporter extracts the further doctrine: "When a contract has been made without reference to the laws of the State where it was made, or to the laws of the place of performance, and a rate of interest was reserved forbidden by the laws of the place where the contract was made, which was concealed under the name of exchange, in order to evade the law of usury, the question is not which law is to govern in executing the contract; unquestionably it must be the law of the State where the agreement was entered into, and the instrument taken to insure its performance. A contract of this kind cannot stand on the same principles with a *bona fide* agreement, made in one State, to be executed in another. In the last mentioned cases, the agreements were permitted by the *lex loci contractus*, and will even be enforced there if the party is found within its jurisdiction. But the same rule cannot be applied to contracts forbidden by its laws, and designed to evade them. In such cases the legal consequences of such an agreement must be decided by the law of the place where the contract was made. If void there, it is void everywhere" (*Andrews v. Pond*, 13 *Peters' R.*, 65, 77, 78). In an earlier case, the Supreme Court

of the United States held that when a bill was drawn in Georgia on merchants in South Carolina, the interest chargeable on the bill, in an action against the drawer for an alleged liability as acceptor, should be at the rate of interest allowed by the laws of South Carolina, and not the interest of Georgia; Mr. Justice Thompson saying: "The contract of the defendants, if any were made, upon which they are responsible, was made in South Carolina. The bills were to be paid there; and, although they were drawn in Georgia, they were drawn, so far as respects the defendants, with a view to the State of South Carolina for the execution of the contract" (*Boyer v. Edwards*, 4 *Peters' R.*, 111, 123).

These rules are subject to the qualification that the parties act in good faith, and that the form of the transaction is not adopted to disguise its real character. If a note, for instance, is made payable at a place foreign to the residence of either of the parties and to the subject-matter of the contract, *for the purpose* of obtaining a higher rate of interest than the laws of the place of contract allow, with *intent to evade said law*, the contract will be usurious if the rate of interest specified exceed the rate allowed by the *lex loci contractus*; and perhaps it might be added that when a contract is made payable at a place other than the residence of either of the parties, and foreign to the subject-matter of the contract, and a higher rate of interest is stipulated for than the laws of the place of contract permit, the parties will be *presumed* to have intended a fraudulent evasion of those laws. Such, probably, would be considered the rule (*Vide Miller v. Tiffany*, 1 *Wall. R.*, 298).

Judge Story says: "The general rule is, that interest is to be paid on contracts according to the law of the place where they are to be performed in all cases where interest is expressly or impliedly to be paid. * * * Thus, a note made in Canada, where interest is six per cent, payable with interest in England, where it is five per cent, bears English interest only. Loans made in a place bear the interest of that place, unless they are payable elsewhere. And if payable in a foreign country, they may bear any rate of interest not exceeding that which is lawful by the laws of that country. And, on this account, a contract for a loan made, and payable in a foreign country, may stipulate for interest higher than that allowed at home. If the contract for interest be illegal there, it will be everywhere; but if it be

legal where it is made, it will be of universal obligation, even in places where a lower interest ~~is~~ prescribed by law. The question, therefore, whether a contract is usurious or not, depends not upon the rate of the interest allowed, but upon the validity of that interest in the country where the contract is made and is to be executed" (*Story's Con. Laws*, §§ 291, 292). The learned commentator has fortified these several propositions by a reference to numerous judicial authorities, among which is one wherein the court said: "With respect to the question of usury, in order to hold the contract to be usurious, it must appear that the contract was made here, and that the consideration for it was to be paid here. It should appear, at least, that the payment was not to be made abroad; for if it was to be made abroad it would not be usurious" (*Thomson v. Powles*, 2 *Simons' R.*, 194).

According to this doctrine, as enunciated by Judge Story, where a contract is entered into in one State for the payment of money in another, with interest specified according to the rate allowed in the State where the contract is made, but higher than that in the State where the debt is to be paid, the transaction would be usurious. And the learned commentator says: "John Vost, in his Commentaries on the Pandects, holds this very doctrine, which appears to me to be entirely in harmony with the received principles of international law. He considers that interest must be according to the law of the place where the contract is to be performed, whether that place be where the contract is made, or it be another place. If the interest is in either case stipulated for beyond that rate, he deems it usurious. * * * Bur-gundus adopts the same doctrine. * * * In cases of express contract for interest, foreign jurists generally hold the same doctrine" (*Story's Con. Laws*, §§ 293 *d*, 293 *e*, 294). But this doctrine has not always been adopted to the furthest extent, and especially by the courts of the State of New York. It has been held by the late Court of Chancery and by the Supreme Court of New York, in so many words, that, upon a contract for a loan of money made in one country and payable in another, the parties may stipulate for the payment of interest according to the laws of the place where the contract is made. Accordingly, promissory notes made and dated in Minnesota, for money there loaned and advanced, payable at a bank in the State of New York, with interest at twenty-six and one-half per cent per annum, and

secured by mortgage on land in Minnesota, were held by the Supreme Court of New York to be valid, and the court therefore refused to direct them to be surrendered and canceled (*Balme v. Wombough*, 38 *Barb. R.*, 352). The notes would have been usurious had they been judged by the laws of the State of New York; but not so by the laws of Minnesota, because by the laws of the latter State any rate of interest is allowed which may be agreed on by the parties; and it should be added that the court found in the case that the lender of the money, who resided in the State of New York at the time of the loan, had no intention to violate the laws of New York in making the loan. This was regarded as an important circumstance in the case, for, had it been otherwise, the laws of New York might have been applied to the transaction, and the notes held usurious and void (*Vide Pratt v. Adams*, 7 *Paige's R.*, 615). But in a much earlier case before the court, it was held, when a note was made and indorsed in the city of New York for the benefit of the maker, and delivered to a resident of Connecticut to take to the latter State to get discounted, on behalf of said maker, and which was accordingly taken to Connecticut and discounted at a usurious rate of interest by the laws of New York, that the transaction was not usurious. The note was treated as a foreign contract; that is, a contract entered into in the State of Connecticut; and it was, therefore, held that the burden of proof was upon the party pleading usury to show that the transaction was contrary to the laws of Connecticut; that not being shown, the transaction was upheld (*City Savings Bank v. Bidwell*, 29 *Barb. R.*, 325). This was equivalent to holding what the reporter extracted as the doctrine of the case, viz., that where a loan was made in the State of Connecticut at a greater rate of interest than was allowed by the laws of New York, but no greater than the legal rate in Connecticut, the fact that the note given by the borrower for the amount of the loan was made payable in New York, did not render the transaction usurious and the note invalid. But it will be observed, also, that another important principle is laid down in this case, which is, apparently, against the general rule in such cases, viz., that, in the absence of all proof, the court will *presume* the rate of interest reserved to be in accordance with the laws of the State where the contract was made; whereas, the general rule is, that, in the absence of proof to the contrary, the court

will presume that the laws of a foreign State are precisely like the laws of the State in which the court is held. That is to say, the laws of a country to whose courts a party appeals for redress furnish, in all cases, *prima facie*, the rule of decision. and if either party wishes the benefit of a different rule or law, as, for instance, *lex domicilii*, *lex loci contractus*, or *lex loci rei sitæ*, he must aver and prove it (*Vide Monroe v. Douglass*, 5 *N. Y. R.*, 447; *McCraney v. Alden*, 46 *Barb. R.*, 272). It is the rule, for the very good reason that the courts of a country are presumed to be acquainted only with their own laws; those of other countries are to be averred and proved, like other facts of which courts do not take judicial notice. But in the case of the *City Savings Bank v. Bidwell* (29 *Barb. R.*, 325) it was observed that there is a general principle of law that courts will not presume the commission of crime or the existence of a state of facts which would operate as a forfeiture of property or rights; and it was declared that this presumption is not confined to proceedings instituted with a view of punishing the supposed offense, but holds in all civil suits where it comes collaterally in question. And because the court, by presuming the usury laws of Connecticut to be the same as those of New York, the lender of the money would necessarily be presumed to be guilty of a misdemeanor, the case was held to be an exception to the ordinary rule.

So, it may be quite safely affirmed that where no place of performance is expressly stated or implied from the terms of the contract, the law of the place where it was made will govern in respect to its construction and validity. If a contract is, by its terms, to be performed partly in one country and partly in another, each portion is to be interpreted according to the laws of the country where it is to be performed. Where a contract for the payment of money is made in one State and payment in another, and no interest is expressed in the contract, the interest is to be governed by the law of the place where it is payable; and, in such case, if the rate of interest is expressed, and the same is not greater than is allowed by the laws of each State, the transaction will be upheld; that is to say, if the rate of interest be higher at the place of the contract than at the place of performance, the parties may lawfully contract in that case also for the higher rate. And a party alleging that an agreement is invalid under the usury laws of another State, must show what are the

laws of that State in relation to usury, or the presumption will be indulged that the agreement is valid under those laws. It should be stated here that, notwithstanding the decision of the *City Savings Bank v. Bidwell* (29 Barb. R., 325), the Court of Appeals of the State of New York have held that when a promissory note, made and dated in that State and payable at a bank there, is negotiable in another State, the laws of New York are to control as to the defense of usury; and if the note is discounted at a rate of interest exceeding seven per cent, no action can be sustained upon it in New York (*Jewell v. Wright*, 30 N. Y. R., 259). So far as seems to have been considered, the facts of the case in *Barbour* and the 30th New York are quite similar, although the decisions are directly at variance. In the case of *Bidwell*, the note was drawn, signed, indorsed, delivered and made payable in New York, with the understanding, however, that it was to be discounted in the State of Connecticut. In the case of *Wright*, the note was drawn, signed, indorsed, delivered and made payable in the State of New York, without any proof as to where it was to be discounted. The notes in both cases were made to raise money on, and the indorsers of both notes resided in the State of New York, although the note in the case of *Bidwell* was delivered to a *resident* of Connecticut, to take to the latter State and get discounted. In the prevailing opinion in the case in the 30th New York it is observed: "The main question in the case is, whether the laws of New York or Connecticut are to control as to the defense of usury. The note was negotiated in Hartford, but was payable at Lockport, in New York. Nor can it be claimed that a contract is to be governed by the laws of the place where it is made, if it is not to be performed according to the terms of the contract elsewhere. * * * But if such note or contract is, by its terms, to be performed in another State, then the laws of that State must govern. * * * The fact that the note was dated in New York is alone presumptive evidence that the maker not only resided at the place of its date, but contemplated payment there. For the purpose of charging the indorsers, the makers (indorsers?) must have been sought at their residences or places of business in this State. The same is stated in *Curtis v. Leavitt* (15 N. Y. R., 9, 227), where it is said: 'It is a general rule that the place where contracts purely personal are made must govern as to their construction and validity, unless

they are to be performed in another State or country, in which case their construction and validity depend upon the law of the place of performance.' * * * And in *Cutler v. Wright* (22 *N. Y. R.*, 472) it was held that a note made in New York, but dated in Florida and payable there, was governed by the laws of that place; and it is said the authorities did not leave this question in doubt. The same was also held in *Pomeroy v. Ainsworth* (22 *Barb. R.*, 127). These cases from our own courts render it unnecessary to examine any other class of decisions upon this point." It would seem that this case in the 30th New York substantially overrules the case in the 29th Barbour; at all events, it would hardly be safe to rely upon the law as expounded in the latter case.

Where a contract was made in the State of Georgia, between parties subject to the laws of that State, in pursuance of which one of them drew a bill of exchange in favor of the other, upon a person residing in the State of New York, the Supreme Court of the latter State held that the parties must be considered as contracting according to the laws of the former State, and the transaction was to be determined under those laws. Ingraham, P. J., who delivered the opinion of the court, said: "The contract was made in Georgia, the money paid there, and the drawer as well as the bank were, at the time of the contract, both subject to the laws of Georgia. The mere fact that the funds upon which the draft was drawn were in the hands of a third person, in New York, was no part of the contract so as to affect its validity. The drawer owed the plaintiff some money, and gave the draft in Savannah. The whole transaction took place there, and was performed there, so far as the drawer had anything to do with it. In *Gibb v. Tremont* (20 *Law and Eq. R.*, 555) it was held that on such a bill of exchange, if not paid, the law of the place where made, and not of the place where payable, was to govern as to the rule of damages, and the drawer was liable for interest according to the laws of the country where the bill was drawn. * * * The contract between the parties was made under the laws of another State, and we must consider the parties as contracting according to the laws of that place" (*Bank of the State of Georgia v. Lewin*, 45 *Barb. R.*, 340, 342, 343).

It should be added that when a loan of money is made in one State, and is to be repaid in the same State, the fact that the loan

is to be secured by a mortgage on lands in another State will not change the rule in respect to the laws of the place which are to govern the transaction. In such case, the statutes of usury of the State where the contract was made, and not those of the State where it is secured by mortgage, are to govern it, unless there be some other circumstance to show that the parties had in view the laws of the latter State. This question has been set at rest by repeated decisions, one of which was at an early day by the Supreme Court of the United States. The court observed: "The point is established that the mere taking of foreign security does not alter the locality of the contract with regard to the legal interest. Taking foreign security does not necessarily draw after it the consequence that the contract is to be fulfilled where the security is taken. The legal fulfillment of a contract or loan on the part of the borrower is repayment of the money, and the security given is but the means of securing what he has contracted for, which, in the eye of the law, is, to pay where he borrows, unless another place of payment be expressly designated by the contract" (*De Wolf v. Johnson*, 10 *Wheaton's R.*, 367). The matter of security for the loan has, of itself, nothing to do with the question of the laws by which the validity of the transaction is to be determined; as to that, it is wholly immaterial.

It has been recently held by the Supreme Court of the State of New York that an agreement for the loan of money, made and consummated in New York by residents thereof, by which the borrower is to give a bond accompanied by a mortgage upon lands in Wisconsin, no place of payment being specified, is governed by the usury laws of New York, and not by those of Wisconsin. Mason, J., who delivered the opinion of the court, said: "The question presented for our decision is, whether this is a contract to be governed by the laws of the State of New York or those of Wisconsin, and I entertain no doubt but that it must be regarded as a New York contract, where the *lex loci contractus* controls. Every concomitant to make it a New York contract seems to exist in the case. The parties reside here; the loan was made here; the securities were executed here; the money is certainly payable here, where the parties reside. Upon such a state of facts I am unable to discover any principle of law upon which this can be pronounced a Wisconsin contract; and no adjudged case has been referred to upon the argument, nor have I been able to find any

which holds it such" (*Cope v. Alden*, 53 *Barb. R.*, 350-352). This is in accordance with the doctrine laid down in the same case, when it was before the court for review upon a previous hearing (*McCraney v. Alden*, 46 *Barb. R.*, 272). And a case decided by the Supreme Court of Wisconsin is directly in point upon the same question. The suit was brought to foreclose a mortgage in Wisconsin. The parties both resided in New York, where the loan was made, and the bond and mortgage were executed on lands in Wisconsin. Dixon, Ch. J., in giving the opinion of the court, said: "We have no doubt that this contract is to be governed by the laws of New York. * * * In this case, the parties all resided in New York; the loan was made there; was to be repaid there; and the laws of that State must govern the contract as to its validity and effect" (*Newman v. Kerson*, 10 *Wis. R.*, 333, 340, 344).

The distinction made by the authorities as to the parts of a contract which are to be governed by the laws of the place in which it is entered into, and those which are to be governed by the laws of the place in which the payment was intended, is so well marked that any further discussion of the subject might be considered unnecessary and superfluous. Much might be said in respect to the law of domicile, and the laws which relate to the capacity, state and condition of persons contracting, all of which have more or less to do with questions of usury, and the statute under which the matter is to be determined. But the method adopted in this chapter for presenting the real question to be discussed, and the full statement of the general principles applicable to cases of alleged usury in which a conflict of laws may arise, render any particular reference to those incidental matters undesirable and unimportant. Other matters relating to this question may be directly or indirectly touched upon in the further treatment of the main subject of usury, and in the examination of the cases which are, or are not, within the pale of the usury acts.

It may be pertinent to add, that the statutes of the several States against usury are held to apply to loans made by banks organized under the act of Congress passed June 3, 1864, entitled "An act to provide a national currency secured by a pledge of State bonds, and to provide for the circulation and redemption thereof." In regard to the express provisions of that act, the Supreme Court of the State of New York has recently held that the federal government has exercised its sovereign power over

the law of these institutions; and to that extent its power and its enactment are conclusive. The court further declared, that although the statute has subjected national banks organized under its provisions to the judicatories of the State, so that, as to the form of the action and the proceeding in its courts, the State system of practice is and must be adopted, the federal government not having in that particular expressly asserted its power; yet, in whatever court the action may be pending, the law prescribed in the express provisions of the act of Congress is sovereign and exclusive. Potter, J., delivered the opinion of the court, and, among other things, said: "It will be assumed to be a conceded point that it was within the power of Congress, under the Constitution of the United States, to enact the law in question; and it is perhaps as fully conceded that an act of Congress, passed under the implied powers of the Constitution, has as much potency as one enacted under the express power of the same instrument. It is equally within the Constitution, and such implied powers are also as much prohibited to the States as if they had been expressly forbidden. * * * And the Constitution itself declares that it, and the laws of the United States which shall be made in pursuance thereof, shall be the supreme law of the land; and the judges of every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding (*Const. U. S., Art. 6*). * * * That the national Legislature possessed the full power to legislate in regard to these national banks, and, as to them, to exercise its jurisdiction in its enactments as to all things *necessary and proper* in order to carry its powers into execution; and to regulate the exercise of such powers by such conditions, upon such considerations and by such rules and penalties as to prevent extortion, is a proposition too self-evident to require argument. In this respect the national Legislature is unlimited" (*First National Bank of Whitehall v. Lamb*, 57 Barb., 429, 431, 432). This case, however, was taken to the Court of Appeals of the State, and the judgment of the Supreme Court reversed; the Court of Appeals holding that National Banks, organized under the act of Congress of June 3, 1864, are subject to the usury laws of a State, and the question may thus be regarded as settled (*First National Bank of Whitehall v. Lamb*, 6 Alb. L. J., 382).

CHAPTER VIII.

THE CONSTITUENTS OF USURY — THERE MUST BE A LOAN, EXPRESS OR IMPLIED — THERE MUST BE AN AGREEMENT THAT THE MONEY LENT SHALL OR MAY BE RETURNED.

THE usury laws of the different States in which such laws exist differ in many of their provisions, but what is usury in one State is usury in another, and there are certain principles which may be gathered from the adjudications, which may be regarded as prevalent, if not universal. To constitute usury, it is requisite in the first place that there be a loan of money, express or implied, for which a day of payment is given. It is not imperative that the contract be in the *form* of a loan, but it must be a loan in fact, and whether it be so or not is a question for the jury. The law looks to the substance and the effect of the transaction, and if the same be in truth and in fact a loan, it is sufficient, in whatever form the transaction may be placed. But there can be no usury where there is no debt contracted upon the loan of money. The rule is simple and decided, that the transaction must be one involving the loan or forbearance of money. A person may sell his credit, his responsibility, his goods or his lands; and if he deals fairly, he may take as large a price for either as he can get, and there can be no usury in the case. The authorities are clear and explicit that to constitute usury there must be a loan, directly or indirectly, and that a real sale, without any intent to loan, though it may be oppressive, cannot be usurious. The inquiry often arises, whether the transaction was a real sale in the regular course of business, or a colorable sale, with intent to disguise a loan, and evade the statute against usury; but if the case is proved to be that of a sale, and not a loan, the courts uniformly hold that usury cannot attach, and, indeed, a sale can in no case be *prima facie* evidence of usury; for it is valid unless it be a loan in disguise, and the burden of proof lies on the party claiming it to be usury, and it is necessary for him to show the circumstances which bring it within the statute. A promissory note, valid in its inception, may be sold at a greater discount than the legal interest, without being usurious. In the case of a note given to raise money, the rule would be different. Such a transaction would be regarded a loan, and if the note was sold at a discount exceeding the lawful interest, it would

be *prima facie* usury. But in no case, where the transaction assumes upon the face of it the appearance of a purchase and sale, will the court, as matter of law, pronounce the contract usurious, for the reason that there is *prima facie* no loan. Whenever, therefore, a contract, upon the face of it, is a mere sale, and this is claimed to be usurious, the only question which can be made is, whether it was *bona fide* a sale, and if found to be such, it cannot be usurious, however wrongful the terms of the contract may be. A large number of authorities might be cited to sustain this position, but a few only need be referred to. In an early case in the State of South Carolina, which was an action by an *indorsee* against an *indorser*, on a note made for the *accommodation* of the maker, and sold at a discount beyond legal interest, the court held the note void; but Justice Colcock, in giving the opinion of the court, says: "When a note made *bona fide* for a valuable consideration is brought into market, it may, like any other property, be sold for less than its value. It is, then, always a question of fact for the jury, whether the note is one of that character, or made to evade the statute" (*Fleming v. Mulligan*, 2 *McCord R.*, 173). In a later case in the same State, it was declared by the court: "It is not usurious to sell or buy a negotiable paper founded on a legal consideration for less than its nominal value. When a note or a legal consideration is drawn to order and indorsed, no matter how often it has been polluted in the hands of intermediate holders, it is still valid in the hands of a *bona fide* holder. * * * Courts of justice have universally labored to untrammel the restraints on the circulation of negotiable paper as indispensably necessary to the existence of commerce. They constitute, indeed, the mainspring, the very sinews of all commercial enterprise, and without them all its operations would be greatly impeded, if not wholly obstructed. * * * Bonds, notes, bills of exchange, bank notes, certificates of stock, and even specie itself, are the common subjects of traffic, and their intrinsic value must always depend on such a variety of circumstances that no foresight or wisdom can regulate it. * * * To declare that the parties to such traffic had incurred the pains of usury, would convulse the whole commercial world to its center" (*Johnson v. King*, 3 *McCord R.*, 365, 368). And in a still later case in the same State, the court reiterate their former doctrine, that notes originally founded on a good consideration, though afterward sold for less

than they are nominally worth, do not make a case of usury (*Herrick v. Jones*, 4 *McCord R.*, 402). The same doctrine was declared by the Court for the Correction of Errors of the State of New York, at an early day, and it has been adhered to ever since. It was observed: "To purchase a note is a perfectly legal transaction; to purchase for less than its face is forbidden by no principle of law or morality. Whether there be in such a sale and transfer a violation of moral obligation, must depend upon the fact whether one party shall or not take an undue advantage of the circumstances or necessities of the other. To constitute a violation of the statute against usury, there must be a loan. * * * The sale of a note being a legal transaction, it must be deemed valid until it shall be proven to have been done merely as a cover to a loan and an evasion of the statute" (*Crane v. Hendricks*, 7 *Wend. R.*, 569, 635; and *vide Rapalye v. Anderson*, 4 *Hill's R.*, 472). And in the Supreme Court of the United States, in a case in which the question of usury was discussed at great length, it was held that a loan, express or implied, is indispensably necessary to constitute usury, and it was remarked: "If it were a *bona fide* purchase, there is an end of the question of usury" (*Lloyd v. Scott*, 4 *Peters' U. S. R.*, 205). Indeed, one general principle appears to govern all the standard cases, whether decided by the courts of the American States or of England, which is, that a note given for a valuable consideration, and free from usury in its origin, cannot be tainted by any subsequent transaction; but a note originally made for the purpose of raising money, and which is sold or discounted for more than the legal rate of interest, is void. The difference between a note made for the sole purpose of raising money, and one given for a valuable consideration, is very obvious. The first, in its inception, is intended as security for a loan, and represents credit only, not property; while the other is given for goods, or other valuable consideration, and is the representative of money or property, as truly as the note of a bank is such a representative; and it might as well be called usury to sell a bank note for less than its face as to call it usury to sell, on the same terms, a promissory note representing property. So essential is this ingredient, that the Supreme Court of the State of New York held, twenty-five years ago, that one may *bona fide* sell his credit, by way of guaranty, or by making a note for another's accommodation, though for a compensation exceeding

the legal rate of interest, and that there will be no usury if the transaction be unconnected with a loan between the parties. In giving the opinion of the court, Bronson, Ch. J., said: "The plaintiffs sold their warranty, or credit, to the defendants for a commission of two and a half per cent on securities payable in four months. The rate of compensation is a matter of no legal importance; for, if the plaintiffs had a right to charge anything, they might charge whatever sum the defendants would agree to pay. There was no negotiation nor agreement for or about a loan; nor was any loan ever made. It was a sale of credit, and nothing more. The defendants may have made a bad bargain; but there was no usury in the case" (*More v. Howland*, 4 *Denio's R.*, 264, 268). This case has been uniformly recognized, and is regarded as well settled law; and it seems that the transaction must be, in fact, *exclusively* that of a loan, in order that it may be impeached for usury, subject, of course, to the proviso that there is nothing in it intended as a cover to a loan. Accordingly, it has been recently held by the New York Court of Appeals that the lender of money may lawfully receive from the borrower a reasonable compensation, in excess of interest, for services and expenditures in procuring the money to be loaned, provided the services were performed and the expenditures incurred at the request of the borrower, and upon his express promise to pay therefor. The compensation thus received is said to be distinct from that agreed to be paid for the loan or forbearance of the money. The latter is interest, and cannot lawfully exceed the statute rate. The former is a stipulated price for work, labor and services done and performed, and for money paid, laid out and expended; as such, it constitutes a distinct demand, which might be recovered in a separate action, if not included in the security taken for the principal debt" (*Thurston v. Cornell*, 38 *N. Y. R.*, 281). And it had been previously held by the same court that when the agreement for a loan or advance of money or goods is only part of an entire contract, embracing other matters, and more than the legal rate is reserved, such a transaction is not necessarily usurious; that it is never, in such cases, a necessary inference that the premium was reserved solely for the forbearance; and it was said that the amount to be paid was of no importance, except as it may bear upon the intent of the parties (*Smith v. Marvin*, 27 *N. Y. R.*, 137). But further reference is unnecessary. The doctrine

has long been recognized by the courts, and appears now to be the well settled and established law of the land, that, to constitute usury, it is requisite that there must be either a direct loan, or there must be some device for the purpose of concealing or evading the appearance of a loan, when, in truth, there was one. The component parts of a loan are a voucher or contract, specifying the nature of the transaction, the time of payment or redemption, the rate of interest for the use of the money loaned, and the intention of one to loan and the other to borrow; and the real substance of the transaction, and not the color and form of it, will always be examined for the purpose of determining whether it be a loan, or something else.

The second requisite of a usurious transaction is, that there be an understanding between the parties that the money lent shall or may be returned. For example, if a party make a loan of another, and agree to pay a specific sum, exceeding the lawful interest, provided he do not pay the principal by a day certain, it is not usury. By a punctual payment of the principal, he may avoid the payment of the sum stated, which the law regards as a penalty; or, where a loan is made to be returned at a fixed day with more than the legal rate of interest, depending upon a casualty which hazards both principal and interest, the contract is not usurious; but if the interest only is hazarded, the rule is different; it is then usury. In the latter case, the lender is sure to have the principal again, come what will; and this brings the case within the rule; but in the former, the lender may lose both principal and interest, according to the precise terms of the agreement, and hence the transaction cannot be usurious, if *bona fide*, because it lacks the requisite that the money loaned must be absolutely returned. Indeed, if the principal only is put in hazard by the arrangement, that is, if by the terms of the loan a contingency may happen on which the lender may have returned less than his principal, there is no usury. The authorities are very numerous and decided, both in this country and in England, holding that an agreement, in good faith, to pay even double the amount of money borrowed, or other penalty, on the non-payment of the principal debt at a certain day, is not usurious, because it is in the power of the borrower wholly to discharge himself, by repaying the principal according to the bargain. This doctrine is well illustrated in an early case in Massachusetts, where the action was assumpsit on

a promissory note, made by the defendant, by which he promised to pay and deliver to the plaintiff nine hundred and twenty-eight bushels of oats by the seventh day of October next after the date of the note. It appeared on the trial that the note was given for a debt which the oats would pay at twenty cents a bushel, whereas, in *fact*, the oats were worth at least thirty-seven cents a bushel at the time the note was made. But it also appeared that, at the time the note was given, the plaintiff stipulated that if the defendant would give the note he would discount upon it five bushels of oats for each silver dollar paid thereon, if the same should be paid one-half in thirty days and the other half in sixty days; and on these terms the note was made. Within the thirty days the defendant paid one hundred silver dollars, pursuant to the agreement, which the plaintiff indorsed on the note, in lieu of five hundred bushels of oats. The balance remaining unpaid, the action was brought. The court held that, by the terms of the contract, the defendant might, by making payment in thirty and sixty days, have avoided everything but the discharge of what was honestly due from him, for which the note was given as security, and that therefore the note was not usurious (*Cutler v. How*, 8 *Mass. R.*, 257). In this case, however, the decision might have been different had it not been for the stipulation that the maker might discharge the note for the oats at their real value, for the same court held at the same term, in a case in favor of the same plaintiff, that a similar note without the stipulation was void for usury. The case was this: The defendant owed the plaintiff a sum of money and gave him his promissory note, payable in six months, in a specific commodity, at a much lower rate than its current value. The note not being paid at the time it fell due, the plaintiff put it in suit, and afterward adjusted the suit by taking a new note for the balance of the former at the low rate of the commodity, and made the new note also payable at a given day, in a specific commodity, at a lower rate than its current value. The last note was held to be usurious and void (*Cutler v. Johnson*, 8 *Mass. R.*, 266). According to the report of the case, the court held, as a question of law, that the note was usurious; but this is probably a mistake, for the court granted a new trial, doubtless to have the question passed upon by a jury whether the transaction was not really a shift to enable the plaintiff to get more than legal interest for the forbearance of his money, and if

it was, whatever its color and form, it was usurious. But if it was simply a contract *in good faith* to pay a *bona fide* debt in property at a stipulated price, the transaction could not be considered usurious. In all such cases, therefore, it becomes a question of fact for the jury, whether it was an honest and fair contract, or intended merely as a cloak for usury. It should be stated, however, that it is not requisite that the principal loaned is to be returned in money, in order to make the transaction usurious. Although the principal and interest may be contracted to be paid in labor or property, still the transaction may be within the statute against usury, provided the other necessary ingredients are found in it (*Vide Hamer v. Harrell*, 2 *Stew. & Port. R.*, 323; *Richardson v. Brown*, 3 *Bibb's R.*, 207; *M'Gennes v. Hart*, 4 *id.*, 327; *Woodward v. Fitzpatrick*, 9 *Dana's R.*, 121; *Lindsey v. Sharp*, 7 *Monroe's R.*, 248; *Thorp v. Ruks*, 1 *Dev. & Bat. Eq. R.*, 613).

A very common case, illustrating the doctrine that in order to constitute usury there must be an understanding between the parties that the money lent shall be returned, is that of the sale of annuities; for it has been determined in all the cases upon this subject that a purchase of an annuity, however exorbitant the terms may be, can never amount to usury. But even in those cases, if the transaction respecting the annuity be only a cover for the advancement of money by way of loan, it will not exempt the security taken from the taint of usury. And in respect to those cases where the loan is attended by some contingent circumstances which subject the money lent to evident hazard, so that the transaction is not within the statutes against usury, it must be remarked that a mere nominal contingency, attended by no real hazard of the principal of the money lent, will not divest the transaction of its usurious character. The ordinary risk of the death or insolvency of the borrower is not such a hazard as will have such effect. But the doctrine is well settled that, in order to constitute usury, there must be in substance a loan or advance of money, and the borrower must agree to return the amount advanced at all events, and independent of contingency or hazard (*Vide Dowdall v. Lenox*, 2 *Edw. Ch. R.*, 267; *Cotton v. Dunham*, 2 *Paige's Ch. R.*, 267). To repeat: in order to constitute usury, there must be a loan of a certain kind; that is to say, there must be a loan, properly so called; a temporary letting, for profit, of the use of money or goods, to be absolutely returned by the borrower to the lender.

It is this quality of its being returnable that constitutes a loan, and hence there can be no usury in contracts which include risks or contingency. Such contracts may be unconscionable and oppressive, from which relief may be had in a court of equity; but they cannot be regarded as usurious in a court of law. It is the intention of the law, while protecting from usury, not to endanger or impair contracts which are necessary to commercial dealing, and common in the intercourse of men; and the statutes against usury are therefore never held to apply in cases where the principal and interest are put in hazard upon a contingency, and where there is a risk that the lender may have less than his principal. The reason which has been assigned for this rule is that such contingency is the main characteristic of contracts of trade; and, therefore, taking such advance of money out of the form of a loan, it renders it a new contract, and much mischief might ensue if such contracts could be shaken. But, as before suggested, the court will always, in these cases, exercise a sound discretion, with the assistance of a jury, to ascertain whether the contingency be real and *bona fide* or a mere shift to elude the statute against usury. The contingency must, in all cases, be lawful, and it should also be fair and reasonable in order to rebut the presumption that it is only a cover for usury. And the mere circumstance that the contract has the form of a real contingency will not exempt the transaction from the scrutiny of the courts, who are bound to exercise a judgment whether the contingency be a real one or a shift and device to cover usury. The distinctions in cases of contingencies have often been taken and discussed by the courts, and the authorities are uniform as to the principles governing such cases. A learned English judge well illustrates the doctrine in an early case, taking the distinction thus: "First, if I lend £100 to have £120 at the year's end upon a casualty; if the casualty goes to the interest only, and not to the principal, it is usury, for the party is sure to have the principal again, come what will come. But if the interest and principal are both hazarded, it is not then usury; and it was, therefore, judged in C. B. in Dartmuth's case, where one went to *Newfoundland* and another lent him £100 for a year to victual his ship, and if he returned with the ship he would have so many thousand fish; and expresses at what rate, which exceeded the interest which the statute allows; and if he did not return, that

then he would lose his principal, it was adjudged to be usury. Secondly, if I have both interest and principal, if it be at the will of the party who is to pay it, it is no usury; as if I lend to one £100 for two years, to pay for the loan thereof £30, and if he pay the principal at the year's end he shall pay nothing for interest, this is not usury, for the party hath his election, and may pay it at the first year's end, and discharge himself" (*Roberts v. Tremange, Cro. Jac.*, 308). In order to constitute usury, there must, in fact, be a loan, and the principal loaned must, by understanding of the parties, be returned to the lender; but, though the form of the transaction be that of a sale, if it was not the intention of the parties to buy and sell, but to borrow and lend, and if the contract was, in truth, for a loan of money, it will be declared usury, though under the mask of a treaty for the sale of goods. And, on the contrary, though the form of the security given may import a loan, it may not, in fact, prove to be so. The substance of the transaction is to be principally regarded, against which expressions in the instrument, which can only with strict propriety be applied to a loan, have but little weight. To be sure, in all such cases, every circumstance by which a contract is assimilated to a loan bears the aspect of corruption, and has a tendency to reveal the *mala fides* of a usurious contract; but the question whether the contract is in substance a loan, disguised in shape to evade the law, or a *bona fide* contract of another species, belongs to the decision of the jury; and if it be found that the transaction is not that of a loan, the principal of which is to be returned, without hazard or contingency, it cannot be usurious. The doctrine is unquestionable, and has been quite recently confirmed in a well-considered case in the Supreme Court of the United States, in which the rule, as extracted from the opinion by the reporter, was declared, that, when the promise to pay a sum above legal interest depends upon a contingency, and not upon any happening of a certain event, the loan is not usurious; and it was held that usurious interest will not be inferred from a paper which, while referring to payment of a sum above legal interest, is "uncertain, and so curious" that intentional bad device cannot be affirmed (*Spain v. Hamilton, 1 Wallace, 604*). So it may be observed, that upon consulting all the authorities upon this subject, it appears that, when either the principal alone, or, *a fortiori*, both principal and interest are hazarded, there can be no usury; but this hazard

must be real, and not colorable, and the rule only extends to cases where the principal is included in the contingency; for, if the interest *alone* be hazarded, no favor is extended to the contract. That is to say, this is the general rule; but there is a single exception to it, viz., when the exorbitant profit or interest is reserved in the nature of a penalty to be paid upon some default, which the borrower may avoid by the payment of the principal, and so defeat the interest. Here the principal may be reserved, and the interest alone be subject to be defeated by the contingency, and still the transaction may be exempt from the operation of the statute against usury.

The principle of hazard, which exempts a contract from the charge of usury, is well illustrated in the case of those contracts which are denominated *post obits*, by which a borrower, in consideration of a sum of money paid *instantly*, agrees to give the lender a larger sum upon the death of some particular person or persons. So, also, the principle is illustrated in the case of *bona fide* annuities for life, or lives; but these matters will be fully discussed in future chapters, and, so far as the objects of this chapter are concerned, perhaps enough has already been said.

CHAPTER IX.

CONSTITUENTS OF USURY — ILLEGAL INTEREST MUST BE RESERVED OR TAKEN — THERE MUST BE A CORRUPT AGREEMENT TO TAKE MORE THAN THE LEGAL RATE.

To constitute a usurious transaction, it is requisite not only that there be a loan, either express or implied, and an understanding between the parties that the money lent shall or may be returned, but, in the third place, a greater rate of interest than is allowed by law must be paid, or agreed to be paid, as the case may be. When the security given for the money loaned expresses upon its face an illegal rate of interest, there can be no difficulty in determining the character of the transaction; it must be regarded as usurious. But, in most cases, when usury is alleged, only legal interest is nominally reserved, so that an inquiry into the substance of the transaction must be made. The rule, however, is obvious, that, in

order that there be usury in a transaction, more than legal interest must be paid or reserved. It need not be in the *form* of interest, necessarily; it may be included in the principal received, or be paid as a distinct *bonus*; but it must be, in effect, the payment or reserving of a greater rate of interest than the law allows for the use or forbearance of money, or the transaction cannot be brought within the pale of the usury laws. An illegal rate of interest may be taken or reserved in various ways, when, upon the face of the transaction, everything appears fair and in accordance with the law. Illegal interest may be reserved when the legal rate is to be taken before the end of the term for which the money is lent; for it is clear, that, if the lender of a sum of money, payable with interest for forbearance during a certain term, receive all or any part of the interest during that term, he will thereby have taken interest above the statutable rate. Again, illegal interest may be reserved in some cases, when goods are advanced instead of money. For example, when a man sells to a person, in want of money, an article of personal property at a price beyond its real value, which the individual purchases, not because he desires the article for his own use, but really to enable him, by selling the same for what it will fetch, immediately to relieve his necessities. Now, the contract under which such a sale is made, or the instrument taken to secure the purchase-money of the thing sold, may be just as obnoxious to the charge of illegal interest as though the vendor had, instead, actually lent the vendee a sum of money just equal to the true value of the article sold, and taken his note for the amount at which it was sold by him. In the case supposed, the real object which the person had in taking the article of property was the immediate means of supplying his wants; and the purchase was, therefore, merely colorable. So, also, illegal interest may be reserved in cases of transfers of stock, and indeed the temporary transfer of stock in the public or other funds is an engine of usury which is often resorted to. The loan or transfer of stock, if *bona fide*, is not usurious; and when stock is lent, and the dividends in the meantime are paid over to the lender, even though they exceed the legal rates of interest, may not render the transaction usurious. And perhaps usury can only attach to such a proceeding where the party transferring receives, or is likely to receive, more than the legal rates, and cannot by possibility receive less. It is never important to inquire as to the shape in which the profit upon

money lent is to accrue ; it is sufficient that such profit exceed the legal rate, in order to bring the transaction within the statute against usury. And yet it may be unqualifiedly affirmed that a vital element in every case of usury is, that a greater rate of interest than is allowed by law has been paid or reserved, and that without this constituent no usury can exist.

Finally, and in the fourth place, in order to constitute usury, there must be a corrupt intent to take more than the legal rate for the use of the money loaned. This is a very important ingredient to constitute the offense, and there can be no usury in any transaction in which the parties did not intend to do the thing forbidden by the law. The act of usury has long since lost that deep moral stain which was formerly attached to it ; and it is now generally considered only as an illegal or immoral act, because it is prohibited by law. Ignorance of the law will not protect a party from the penalties of usury when it is committed ; but where there was no intention to evade the law, and the facts which amount to usury, whether they appear upon the face of the contract or by other proof, can be shown to be the result of mistake or accident, no penalty attaches, and there is in fact no usury. The agreement under which the illegal rate of interest is reserved must be corrupt, because it is a violation of law ; but it cannot be a corrupt agreement unless the act of violation of the law was intended. The authorities are uniform upon this point. It is the essence of a usurious transaction that there shall be an unlawful and corrupt intent on the part of the lender to take illegal interest ; in other words, there must be an intention knowingly to contract for or take usurious interest. For if neither party intend it, but act *bona fide* and innocently, the law will not infer a corrupt agreement. To be sure, when the contract upon its face imports usury, as by an express reservation of more than legal interest, there is no room for presumption, for the intent is apparent, *res ipsa loquitur*. But when the contract on its face is for legal interest only, then it must be proved that there was some corrupt agreement, or device, or shift, to cover usury, and that it was in full contemplation of the parties. It is not enough that the borrower intended to make a usurious agreement, but the intention to take the usury must have been in the full contemplation of the parties, not of one party, but of both, to the transaction. There must be an *aggregatio mentium*. This is the rule as lately laid down by

the New York Court of Appeals, and it is sustained by numerous authorities (*Vide Condit v. Baldwin*, 21 *N. Y. R.*, 219; *Lloyd v. Scott*, 4 *Peters' R.*, 205; *Bank of the United States v. Wagoner*, 9 *id.*, 399).

The terms of a contract are always a matter of fact, and although more than the legal rate of interest may in fact be reserved or taken, if it appears from all of the circumstances of the case that it was not in the contemplation of the parties to reserve or take usurious interest, the transaction will not be tainted with usury. There must be an intent to take illegal interest, or, in the language of the law, a corrupt agreement to take it, and therefore the *quo animo* is an essential ingredient in all these cases of alleged usury. If it appears that illegal interest is reserved or taken, and it is manifest that the parties intended to do, and in fact did do, everything necessary to constitute a usurious loan, then the case is one of usury, and it will be in vain for the parties to allege afterward that they did not intend to violate any law. Ignorance of the law excuses no man, for all are held to know what the law is; and if the acts of the parties are in violation of the law, the only question which can arise is, as to whether the acts were intended. If it be the real intention of the parties to receive or reserve a given rate of interest, and that rate turns out to be usurious, the transaction will be regarded as usury, whether the parties knew the interest to be usurious or not. The legal character and effect of the transaction cannot be changed or evaded by any fairness of mere intention that may be ascribed to the parties, unless the intention have reference to *facts* of the transaction itself. No error of the parties, as to the effect of the transaction under the law, can give validity to a contract made in violation of the law. Where there is a controversy as to what the transaction is, the intention of the parties may have effect in determining its character; but where the fact, and intention to do what was done are manifest, the law is only to be appealed to for the effects and consequences. Said Eyre, Chief Justice, in a case before the English Court of Common Pleas seventy-five years ago, in substance: "I will begin with stating my assent to the proposition, that where a party on a contract for a loan intentionally takes more than the legal rate of interest for the forbearance of the loan, he is guilty of usury. But I add to it this further proposition, that whether more than the legal rate is intentionally taken upon any contract for such

forbearance, is a mere question of fact for the consideration of the jury, and must always be collected from the whole of the transaction as it passes between the parties. And I am of opinion that it never can be determined that any particular fact constitutes or amounts to usury, till all the circumstances with which it was attended have been taken into consideration. As, on the one hand, I am to carry into effect a law which the policy of all times has deemed useful, and which expressly provides against any subtle devices or evasions by which its penalties may be eluded (and had it not been so provided, I should have thought it my duty to use all the influence of my situation to prevent such devices and evasions from having any effect); so, on the other hand, common justice requires that the whole of the transaction should be before the jury, and should be taken fairly, with a just application of all the circumstances to every conclusion of fact which the evidence will warrant. * * * I repeat, that I cannot agree that in usury, more than in any other case, the whole transaction is not to be taken together; that it is not to be analyzed and reduced to all the facts of which it is composed, and to all the conclusions of fact which fairly result from the whole of the evidence; and that the law does not arise from a fact so considered. Whether more than the legal rate of interest be intentionally taken for the loan and forbearance of money, is a question of fact to be decided by the jury" (*Hammett, Sir B. v. Sir W. Yea*, 1 Bos. & Pul., 144, 151, 154). Where there has been no taking of usury, and no reservation of usury on the face of the transaction, then the case resolves itself into the inquiry whether, upon the evidence, there was any corrupt agreement or device, or shift, to reserve or take usury; and in this aspect of the case the *quo animo*, as well as the act of the parties, is most important. This is the turn which most cases of alleged usury take. It is very seldom that a transaction occurs, on the face of which there is a reservation of any interest other than legal interest. The charge of usury, in most instances, attaches to pretended cases of exchange of credits or commodities, or where a profit is realized for something besides the use of the money loaned or the debt forborne. And if in such case it appears that no disguise has been used; no seeking to cover a loan of money under the pretense of a sale or exchange; no effort to obtain an exorbitant gain for the use or forbearance of money, under the guise of commissions, brokerage or the like,

but the transaction is *bona fide*, what it purports to be, the law will not set aside the transaction, for it is no violation of any public policy against usury. And, indeed, a transaction itself may reserve more than legal interest on its face and yet be free from the taint of usury. To be sure, if more than legal interest is reserved on the face of the affair, usury is made out *prima facie*; for without further proof, the reservation of unlawful interest will be considered as evidence of a corrupt agreement, which is the foundation of usurious contracts. But it is competent for the party to repel the *prima facie* evidence of a corrupt agreement, arising from the face of the transaction by showing, if in his power, that more than the rate of interest was reserved by mistake, and contrary to the intent of the party. This has been frequently held. The doctrine is well illustrated in an early English case, where the agreement was to lend £50; and the scrivener, by mistake, drew a bond for more than legal interest, against the will and without the knowledge of the lender, yet he was held entitled to recover (*Bush v. Buckingham*, 2 *Ventris*, R., 83). In such cases it makes no difference whether the scrivener be in error in fact or of law; or, if the security bears a different construction in point of law from what the parties intended, such mistake will not prejudice the lender when his intention was incorrupt (*Vide Nevison v. Whitby*, Cro. Car., 501; *Buckley v. Guildbank*, Cro. Jac., 677). It should be borne in mind, however, that if the parties *intended* to make the identical contract on which the question arises, no extrinsic evidence will be admitted to explain it away. Said Chief Justice Marshall, in delivering the opinion of the Supreme Court of the United States in an early case: "The counsel for the plaintiff has also contended, that although the paper writing produced would, on the face of it, import a usurious contract, yet, as the jury might possibly have inferred from it certain extrinsic facts which would have shown the contract not to have been within the act, the jury ought to have been left at liberty to infer those facts. But in this case the question arises upon a written instrument, and no principle is more clearly settled, than that the construction of a written evidence is exclusively with the court" (*Levy v. Gadsby*, 3 *Cranch's R.*, 180). This is upon the assumption, however, that the instrument contains the unmistakable contract of the parties; and even in such a case, if the contract is susceptible of a fair construction, not

at variance with the statute against usury, it is the duty of the court so to construe it; and it is a well-settled rule, in the interpretation of contracts, and is applicable in cases of alleged usury as in others, that, when a clause is capable of two significations, it should be understood in that which will have some operation, rather than in that in which it will have none; and, further, it should be understood in the sense which is most agreeable to the nature of the contract; and, in all cases, the agreement should be examined in reference to what was the common intention of the contracting parties, rather than the grammatical sense of the terms. But, where there is no latent ambiguity in the agreement, no parol evidence will be admitted to explain it (*Vide Pothier on Obl., part 1, chap. 1, § 1, art. 7; Coker v. Guy, 2 Bos. & Pull. R., 565*). Sometimes it happens that, by an error in calculation, an excess of interest may be included in the transaction; but this will not necessarily make the transaction usurious. To constitute usury, as has been before stated, there must be an illegal agreement; and this cannot be predicated of a case in which an excess was the result of accident or inadvertence, without any knowledge that more than the legal rate was secured by the contract. It must have been the *intent* of the parties that the excess of interest be included and paid. This has been repeatedly decided. Said Sutherland, J., in delivering the opinion of the old Supreme Court of the State of New York, in a case involving the precise question: "Nor does the fact that the note first discounted exceeded the debt due to the company to a small amount, and that the excess was paid to Butler, vary the case. It was evidently the intention of the parties that the note should be for the amount due only; but upon stating the account, and casting the interest, there was found to be a trifling difference of twenty dollars" (*N. Y. Firemen's Insurance Co. v. Sturges, 2 Cow. R., 664, 677*). A mere mistake in calculation was never held to be usury, for the reason that there must be a corrupt agreement, of which that is no evidence. There must be an *intent* to take or reserve more than the legal interest; and the quality of the intention, in order to constitute usury, must be, that it is willful, or, in other words, there must be a corrupt agreement, and not upon a just and true intent. Hence, as we have seen, when more than the allowed rate of interest was reserved in the security by the mistake of the person who drew it, and contrary to the intent of the party, it was decided by the

English courts not to be usury; usury being a penal act, and no man being criminal by mistake (*Vide Booth v. Cook*, 1 *Freeman's R.*, 264; *Bucklin v. Millard*, 2 *Ventris' R.*, 107). Indeed, from the very words of statutes of usury, it would appear that the law looks straightly to the intentions of the parties; and it is accordingly upon those words that the courts exercise their discretion of examining what is the real substance of the transaction, and not what is the color and form. And, therefore, all loans, properly so called, upon which more interest is taken than is allowed by statute, and which interest is taken willfully and corruptly, that is, with a usurious intent, no matter in what shape, are usurious contracts; and when there is an absence of this intention to take or reserve the illegal interest, there can be no usury.

To sum up upon this point, then, it is admitted by all the writers and in all the codes upon the subject, that the *intention* of the contracting parties is the principal subject of inquiry in determining whether a contract be usurious or not; for, if the intention of the contracting parties be righteous, the intent cannot be within the statutes of usury. It is said by Mr. Justice Gould, of the English courts, that "the ground and foundation of all usurious contracts is the corrupt agreement" (*Murray v. Harding*, 2 *Bl. R.*, 865). The cases all go upon the principle, that the *corrupt agreement* is the essence of the offense, and that a party shall therefore be permitted to show what that agreement was, and that it has not been correctly expressed in the written contract. The question of usury is always a question of intent; and there can be no usury without an intention to take a greater rate of interest than is allowed by law. But mark, however, it is not necessary to the offense that there should be *an actual intention to violate the statute*. This has been referred to before. Usury may be committed by parties who, in point of fact, never heard of the statute. Whether the party intended to take more than the legal rate by way of interest, is a question of fact; and, if it be found that he did, it is an invariable inference of law that it was taken in pursuance of a corrupt agreement, which consummates the offense. The doctrine is well illustrated by a case in Massachusetts, in which the court say: "It is probable that, in this case, there was no intentional deviation on the part of the bank, but a mistake of their right. This, however, is a consideration which must not influence our decision. The mistake was not involuntary, as a miscalcula-

tion might be considered, where an intention of conforming to the legal rate of interest was proved, but a voluntary departure from the rate. An excess of interest was intentionally taken, upon a mistaken supposition that banks were privileged in this respect to a certain extent. This was, therefore, in the sense of the law, a corrupt agreement; for ignorance of the law will not excuse" (*Maine Bank v. Butts*, 9 *Mass. R.*, 55). The *intent* of the parties is a legal inference from established facts; but, in all cases of usury, it must actually appear that more than the legal rate of interest was *intended* to be taken, or that the amount intended to be taken was greater than the law allowed. It is not necessary that the party *intended* to act contrary to the statute; but he must intend to take a greater rate of interest than the statute allows.

Where the parties adopt a mode of calculation which gives the creditor more than legal interest, and the parties show that such will be the result, the transaction will be usurious, although the parties may be ignorant that such taking of illegal interest was a violation of the law; and where the parties adopt a theory which they suppose to be in accordance with the statute against usury, as they construe it, but which, nevertheless, results in giving the creditor more interest for the use of his money than the law allows, the transaction will be considered usurious. This is not like the case of an error in *fact*, by which more than legal interest is reserved. In the latter case the transaction is not vitiated by the error, while in the former it is (*Vide Childers v. Dean*, 4 *Randolph's R.*, 406). But there can be no usury where either of the parties remains ignorant of the usurious reservation. For example, when more than lawful interest is reserved, with the knowledge of the lender, but without the knowledge of the borrower, in such case the transaction is not usurious (*Smith v. Beach*, 3 *Day's R.*, 268). The question of usury is always put upon the intention and purpose of the parties; and in order to make a contract usurious, it must be apparent, either upon the face of it or by evidence, that the intention of the parties in the creation of it was, by means of shift or device, to take more than legal interest for the loan or forbearance of money. It depends upon the *intent* of the parties, and they may show anything to make it appear that there was no corrupt agreement. The authorities, both ancient and modern, speak a language on this point too uniform and plain to be mistaken. We cannot know the

agreement unless we look at the intention. This is the essence of every contract, as well as of every crime. There must be a criminal intention or there can be no guilt. Upon any other principle the statute against usury would operate as a snare, in which the artful and designing might entrap their neighbors by setting up and establishing usury where none was ever intended. But where a party deliberately and knowingly takes a greater rate of interest than the statute allows, the law fixes the interest and pronounces the transaction usurious. Thus it appears that, in order to constitute usury, there must be (1) a loan, express or implied; (2) an understanding between the parties that the money lent shall or may be returned; (3) that for such loan a greater rate of interest than is allowed by law shall be paid or agreed to be paid, as the case may be; and (4) a corrupt intent to take more than the legal rate for the use of the money loaned. Unless these four things concur in every transaction, it is safe to affirm that no case of usury can be declared; and this may be regarded as a rule universally recognized in all of the States.

CHAPTER X.

TRANSACTIONS NOT TAINTED BY USURY — CERTAIN RULES APPLICABLE TO USURY — CONTRACTS NOT USURIOUS BECAUSE THERE IS NO LOAN — ELEMENTS OF A LOAN — SALES OF CREDIT — GUARANTIES.

THE four prerequisites of a usurious transaction are well ascertained and well settled. A profit made or loss imposed on the necessities of the borrower, whatever form, shape or disguise it may assume, where the treaty is for a loan and the capital is to be returned at all events, has always been adjudged to be so much profit taken upon a loan, and to be a violation of those laws which limit the lender to a specified rate of interest; but this can only be so because the four indispensable things concur to make it a case of usury. And these rules are applicable everywhere, and under the usury laws of every State. There are other rules applicable to cases of usury, but which are not uniformly recognized in all the States. For example, in the State of New York, a transaction, usurious in its inception, is absolutely void in whose

soever hands it may be ; while in some of the States a contract and security are void for usury only as between the original parties, and not as against assignees and purchasers in good faith, without notice that the instrument was infected by usury. One or two other things, however, may be stated as of general application, in addition to the uniform rules already laid down ; as, for instance, a transaction which is usurious in its inception must always remain so, as between the original parties to it ; and, again, if a transaction be free from usury in its origin, no usurious contract respecting it can taint it with usury ; that is to say, a subsequent agreement to pay a usurious interest will not vitiate a contract legal in its inception.

All of the preliminaries being settled, the way now seems to be open for the consideration of those cases which are and which are not usurious within the several statutes against usury. And first in order, those transactions which are *not* usurious will naturally come under notice, and herein first as to those transactions which are not usurious because they do not amount to a loan. Cases in which this element is wanting are those of sales, compensation for service, credits and the like ; and a reference to authorities will best illustrate the doctrine by which they are governed, premising, however, that, in order to constitute a loan, there must be a lending, and it is essential to the nature of a loan that the thing borrowed is, at all events, to be returned ; that is to say, the component parts of a loan are a voucher or contract specifying the nature of the transaction, the rate of interest for the use of the money loaned, and the intention of one to loan and the other to borrow. It is not necessary, however, to the creation of a loan that money should be paid on the one hand and received on the other ; for the circumstance of a man's money remaining in another's hands, in consequence of an agreement made for that purpose, will equally constitute a loan. But in such case, it is necessary that the debt be absolutely incurred, and not merely resting upon an executory agreement, the execution of which depends upon circumstances that may never take effect. But more of this when the cases are considered.

In all cases where property, goods or things in action, and the like, are *bona fide* sold, instead of money advanced, the courts hold that usury cannot attach, for the want of a loan. In an early action in the Court of Appeals of the State of New York, the question

was invoked and definitely settled in respect to a sale. The facts in brief were: A person had a piece of land which he was willing to sell for \$10,000 in cash, but the person proposing to buy, being unable to pay cash, it was agreed that a deed and a bond and mortgage for \$12,000, payable at a future time with interest, should be executed, to remain in the seller's hands until he could negotiate the sale of the bond and mortgage for a sum equal to the price he asked in cash for the land, and the deed then to be delivered. The papers were executed accordingly, the bond and mortgage afterward sold for \$10,000 cash, and the deed delivered at the same time. On bill filed to foreclose the mortgage, the defense of usury was interposed, and overruled by the late vice-chancellor of the eighth circuit. The decree was subsequently affirmed by the Supreme Court, and the defendant appealed to the Court of Appeals, in which the decree was affirmed, and the transaction held not to be usurious. Jewett, J., said: "The evidence, in my judgment, shows clearly that the upshot of the whole negotiation and contract was, that Williams would not sell unless the sale would produce him in hand \$10,000, or thereabouts. But he would sell upon a credit for \$12,000, upon condition that he could first ascertain that Samain's bond and mortgage for that sum, upon the credit specified with interest, would sell for \$10,000 cash in hand. That was ascertained, upon which the contract was consummated and carried into effect. The transaction between Williams and Samain, so far from being tainted with usury, is shown to be nothing more than the ordinary case of an owner of property, desirous to sell, making a difference in price between a sale for cash in hand and sale on time, with the further condition not to sell absolutely till he ascertains that the security proposed to be taken for the price on time will sell for a sum in cash equal to the sum he is willing to sell for being paid cash in hand, a caution which the owner has a legal right to exercise without being liable to have usury successfully imputed in the contract" (*Brooks v. Avery*, 4 N. Y. R., 225, 229).

To the same general import is a late case in the Supreme Court of the United States. The case came into the Supreme Court by a cross-appeal from the decree of the District Court of the United States for the district of Indiana. The action in the court below involved the validity of a contract, the chief subject of which was a sale of land by parties named Brice and Birkey to one Ruffner

for the sum of \$38,000 in ten annual installments, the sale also including certain personal property. The parties had formed a partnership in February, 1854, "for dealing in lumber, farming" and other objects. Brice and Birkey advanced money, and each had an interest of one-third in the lands, whose title was in the name of Ruffner. In October of the same year the partnership was dissolved, and Ruffner, the defendant, afterward agreed to pay certain sums of money to the other parties for a release of their interest in the land, and gave them his obligations. Afterward, in February, 1855, in order to extinguish these obligations, which he was unable to meet, he agreed to reconvey to Brice and Birkey certain tracts of land. In the spring of 1855 the defendant refused to let them have possession of the lands, and finding that they could not obtain possession without great and ruinous delay, a proposition was made to sell or release all their interest in the lands of the firm if the defendant Ruffner would pay in cash the amount of money advanced by them, which was ascertained to be about \$20,000. They professed a willingness to receive this amount if paid in cash or security given that it should be actually paid in six months. Ruffner, not being able to give the security required, it was finally proposed that the purchase should include certain personal property owned by Brice and Birkey on a credit of two years, which was agreed to at the price of \$38,000, and a written contract accordingly executed, and notes and a mortgage also executed for further security, to which the defense of usury was interposed. The Circuit Court found that the actual indebtedness of Ruffner to Brice and Birkey was \$20,000, and therefore held that the notes for that amount were valid, but that the remaining notes for \$18,000 were usurious and void, and decreed accordingly. From this decree both parties appealed, and the Appellate Court held that it was not a case of usury. Grier, J., in delivering the opinion of the court, said: "Was the contract of Brice and Birkey with Ruffner, which shows the consideration of the mortgage and notes assigned to the complainants, usurious? * * * To constitute usury there must either be a loan and a taking of usurious interest, or the taking of more than legal interest for the forbearance of a debt or sum of money due. * * * The original contract by which a debt is created may be for the purchase and sale of land, and it will be, nevertheless, contrary to the statute for the vendor to demand or receive

more than legal interest for the forbearance of such debt, as in the case of *Crawford v. Johnson* (11 *Indiana Reports*, 258), where respondent's notes were taken for two per cent interest, in addition to the legal interest, on the sum due for the purchase-money of land. But it is manifest that if A. propose to sell to B. a tract of land for \$10,000 in cash, or for \$20,000 payable in two annual installments, and if B. prefers to pay the larger sum to gain time, the contract cannot be called usurious. * * * Such a contract has none of the characteristics of usury; it is not for the loan of money or forbearance of a debt. Does this case come within this category? We are of opinion that it does. * * * The decree of the court below is, therefore, erroneous, in so far as it is affected by the assumption that the contract was usurious" (*Hogg v. Ruffner*, 1 *Black's R.*, 115, 118, 119, 121).

And in a recent case, in the Court of Appeals of the State of New York, the rule was laid down that the mere fact that, in a contract for the sale of land, a higher than the legal rate of interest is reserved upon the deferred payments does not render the transaction usurious.

Selden, J., in his opinion, said: "But there is another reason why the defense of usury cannot prevail. The note was not given for a loan of money or of goods, or for a pre-existing debt of any kind, but upon a lot of lands in Florida. The case, in that respect, is precisely like that of *Beete v. Bidgood* (7 *B. & C.*, 453), where notes, executed in England and payable in England, but given for the purchase-money of an estate in Dunmore, included interest at six per cent, which exceeded the rate allowed in England. The Court of King's Bench held that the notes were not usurious; that, although the word interest was used, the substance of the transaction was, that the purchase-money of the estate was to be paid in installments of a certain amount, a contract which was in no respect illegal. There can be no doubt of the correctness of this decision. To constitute usury, there must be either a present loan or a forbearance in respect to some debt previously existing. In such a case as this, there is neither" (*Cutler v. Wright*, 22 *N. Y. R.*, 472, 482).

This rule, that usury cannot be predicated upon a sale, applies as well to the sale of one's credit as anything else. An important case involving this question was decided by the old Supreme Court of the State of New York. The facts were; In June, 1840,

one Muir made two notes, one for \$2,000 and the other for \$1,000, payable at four months, and procured them to be indorsed for his accommodation by one Barber and one Leman. The notes were then presented by Muir to one Burr, a broker in the city of New York, with a view to raise money on them. Burr said it would be necessary to have the notes indorsed by a person residing in the city, whereupon Muir authorized him to "buy a name or guaranty." Application was accordingly made by Burr to a firm of brokers, of which the plaintiff was a member, who agreed to make the indorsement for two and a half or three per cent. These terms were acceded to by Burr, and the indorsements made on payment of the per centage. One of the notes was discounted by the Union Bank, of which the plaintiff was a director, and the other by some other bank in the city of New York. After deducting the sum paid for the indorsements and his own charge, Burr paid the balance of the proceeds of the notes to Muir. About the time the notes fell due, Muir made two other notes, and left them with Burr to be discounted, directing the avails to be applied to the payment of the first notes. They were accordingly discounted by the plaintiff's firm, with full knowledge of the circumstances, and the proceeds applied as directed by Muir. The action was upon the last notes. The referee reported in favor of the plaintiff for the amount of the two notes with interest, and concluded his report by saying that upon a fair construction of the testimony the first transaction was, in his opinion, the mere sale of indorsements, or, in other words, the giving of a conditional guaranty of the payment of the notes, for which the plaintiff received a stipulated compensation, and that there was no loan of money or of choses in action within the meaning of the statute of usury. The judgment was approved by the court; Nelson, Ch. J., saying, among other things: "It has been repeatedly decided under this act, which is taken, substantially, from the statute of Anne, that, in order to make a transaction usurious, there must be a *loan* of 'money, goods, or things in action' (to use the words of our statute), and an agreement to take more than legal interest for the forbearance; or some device contrived for the purpose of evading or concealing the appearance of a loan, when in truth it was such. The authorities are full to this effect. * * It is not usury, therefore, for an acceptor to discount for a premium his own acceptance due at a future day; for this is not a loan, but

an anticipation of payment; * * * nor is the *bona fide* sale of a bill for a less sum than the amount payable upon its face usurious. * * *

And a contract, made at the time of sale, to pay more than legal interest on the purchase-money of an estate *bona fide* sold, has been decided not to be usurious. * * *

In all these cases, however, if the transaction be a mere device to cover and conceal a loan at unlawful interest, it then comes within the statute. But whether there was such a device, a corrupt intention to evade the law, is a question of fact for the jury to determine, upon a consideration of all the surrounding circumstances. * *

Applying this test to the present case, I am unable to see how we can declare, as matter of law, after the finding of the referee, that the transaction is within the statute. We see there was no loan between the parties, and that, so far as respects the plaintiff's connection with the first notes, he merely sold the guaranty of his firm. There was no application for a loan; and the referee has expressly found that none was directly or indirectly made. In short, the dealing between the parties was, in fact, just what it purports to have been, viz., a stipulated compensation for the guaranty of the plaintiff's firm. The case is, therefore, narrowed down to the question, whether a *bona fide* sale of one's credit or security for the use and benefit of another, unconnected with a loan, is, *per se*, usurious. * * *

From this review of the cases, in our own and the English courts, we may, I think, safely conclude that a guaranty of paper, unconnected with a loan, and really and *bona fide* intended to be what it purports on its face, viz., a security for payment, whatever other objections may be made to the transaction, is not obnoxious to the imputation of usury, even if a commission of more than the legal interest be agreed upon and taken for the same." The report of the referee was permitted to stand (*Ketcham v. Barber*, 4 *Hill's R.*, 224, 227-229, 234). Here, it will be observed, the party received two and a half per cent for guaranteeing a note, and the court held that it was not a loan, and could not, therefore, be a case of usury. This case was taken to the Court of Errors, and the judgment of the Supreme Court was affirmed by a vote of ten against nine, although it seems that one of the majority differed with the Supreme Court in the opinion that the first transaction referred to was not usurious, but he thought the second notes, on which the action was brought, were not connected with

the first, and hence he voted for affirmance (*Barber v. Ketcham*, 7 *Hill's R.*, 444).

In a late case in the same court, the same principle was involved, and the result was the same. The defendants were foreign fruit dealers in the city of New York, and, for the purpose of enabling them to do business more advantageously, they proposed to the plaintiffs that they become the guarantors of their paper at a reasonable commission for the trouble and risk attendant upon the same. The plaintiffs assented to the proposition, it being expressly agreed between the parties that the plaintiffs were not to advance any money or make any payments for the defendants, but only to guarantee to those who might give credit to the defendants the payment of such debts as the defendants might contract on the credit of the plaintiffs. Under this arrangement large transactions were had, and in August, 1846, the defendants gave the plaintiffs a bond and warrant of attorney, to secure the payment of \$14,000, on account of the liabilities which the plaintiffs had contracted for the defendants, and the plaintiffs entered up judgment and issued execution. The defendants subsequently moved the circuit judge of the first circuit to set aside the judgment, on the ground that the transaction was usurious; but the circuit judge denied the motion, holding that the transaction was not a loan by the plaintiffs of money, goods, or things in action, within the statute against usury. The defendants appealed to the Supreme Court, where the matter was fully discussed, and the decision of the circuit judge was affirmed. Bronson, Ch. J., after stating that the plaintiffs sold their warranty or credit to defendants for a commission of two and a half per cent on securities payable in four months, and declaring the same to be a valid transaction, said: "It is easy enough to call the transaction a loan, but that is only giving it a wrong name for the purpose of bringing the case within the statute of usury. That, like every other statute, ought to be rigidly enforced, whatever may be thought of its policy; but we cannot make it a universal remedy for bad bargains without usurping the power of legislation. As the law now stands, a man has as good a right to sell his credit as he has to sell his goods or his lands, and if he deal fairly, he may take as large a price as he can get for either of them" (*Moore v. Howland*, 4 *Denio's R.*, 264, 268).

In another case in the same court, a commission merchant in

the city of New York agreed to accept drafts of a country merchant to the amount of \$20,000, taking a bond and mortgage from him for twice that sum for security, and it was further agreed that all produce shipped to New York by the country merchant should be sent to the former for sale on commission, who should thus be kept in funds to meet his acceptances as they became due, and that he should be entitled to two and a half per cent commission on all advances or acceptances sent otherwise than with produce. The countryman's drafts were afterward accepted and paid by the city merchant to an amount exceeding the value of the produce consigned, and charged the country merchant with interest on all sums thus paid, together with two and a half per cent commission on acceptances not sent with produce. On default of payment, an action was brought to recover the sum advanced upon one of the drafts, and the court held that the transaction was not necessarily usurious, *especially* as it appeared that the charge for commissions was customary among merchants engaged in similar business (*Suydam v. Westfall*, 4 *Hill's R.*, 211). Proof, on the part of the plaintiff, of the reasonableness or customary nature of this charge was probably unnecessary, although such proof was actually given. It has been held by the New York Court of Appeals, in unqualified terms, that, where an indorser of a note makes no advance upon it, the fact of his making a charge for his indorsement will not make the note usurious in the hands of a person who receives it from the maker in the usual course of business and pays value for it without any knowledge of the transaction between the maker and indorser. It seems that if the defense of usury can be sustained in such a case, it must be because the note had a legal inception in the hands of the indorser before it was offered to the party taking it for discount; and the court held that indorsing a note for the maker's accommodation for a premium to be paid by the latter does not make the indorser a holder, or in any way affect a party to whom the paper may be subsequently negotiated. The amount of premium paid by the maker for the indorsement was two and a half per cent (*Kitchel v. Schenck*, 29 *N. Y. R.*, 515; and *vide Van Duzer v. Howe*, 21 *ib.*, 531; *Leavitt v. De Lany*, 4 *ib.*, 364).

In a case of the late Court of Errors of the State of New York, on appeal from the late Court of Chancery of said State, it appeared that a bond and mortgage for \$3,000, payable one year from date,

with interest to become due half-yearly, and on which over five months' interest had already accrued, were assigned absolutely by the holder for \$2,600, in order to raise money. The assignment stated the consideration paid by the assignee to be \$3,000, and contained a covenant that this was due and owing on the bond and mortgage. At the time of executing the assignment, the assignor also executed to the assignee a bond with surety, conditioned that the mortgagor should pay the \$3,000, together with the interest, by the day appointed for that purpose in the securities assigned. On a bill filed by the assignor to set aside the assignment and have the bond of guaranty canceled, it was *held* that the transaction was, on its face, a mere sale of a chose in action, unconnected with a loan, and therefore not usurious *per se*, although the opinion was expressed by several of the senators that, in an action upon the bond of guaranty, the assignor's recovery would be limited to the actual amount paid for the bond and mortgage, notwithstanding the consideration expressed in the assignment. Franklin, senator, said: "To my mind, there is a clear and palpable distinction between the purchase of a chose in action, legal in its inception, and the loaning of money, and that the principles of law which govern and control the former are not applicable to and have no binding effect upon the latter" (*Rapelye v. Anderson*, 4 *Hill's R.*, 472, 482). The doctrine of this last case had been previously enunciated by the same court, and substantially held in several cases in the late Supreme Court of the State.

An action was brought in the latter court by the indorsee against the indorser of two promissory notes, the consideration of which was *rum*, sold by the indorser to the maker. About three months before the notes became due, the payee employed a broker to raise money for him upon the notes, and delivered them to him, indorsed in blank. The broker applied to the plaintiff to discount the notes, and he cashed them, charging a discount of one per cent. per month for the time they had to run, being at the same time informed that the notes belonged to the indorser, and that they were discounted for his benefit. The notes, when due, not being paid by the maker, were protested, and notice of the non-payment given to the indorser, and the action was brought. The circuit judge, before whom the suit was tried, instructed the jury that the plaintiff was entitled to a verdict for the *amount actually advanced* by him, with lawful interest thereon from the

time of the advance, and the jury found accordingly. The defendant excepted to the direction given by the judge, and applied to the Supreme Court for a new trial. The application was denied, and judgment was entered for the plaintiff; whereupon, the defendant brought error to the Court of Errors. And it was held, in the latter court, after mature deliberation, that discounting a business note at a rate of interest greater than the legal rate was not a usurious transaction; that a note, valid in its inception, might be bought and sold, as a chattel, at its real or supposed value; that the transfer by the payee of a valid, available note, upon which he might maintain an action against the maker, and which he parts with beyond the legal rate of interest, is not usurious, although the payee, on such transfer, indorses the note; and that, on non-payment by the maker, the indorsee might maintain an action against the indorser. Said Beardsley, senator: "How, then, does the present transaction partake of the character of a loan? It is said by the counsel of the plaintiff in error that every advance of money for a promissory note to a person who is, or may become, liable to repay it, is, in effect, a loan. It is true, *every* loan implies an advance of money, or money's worth; but it is not true that every advance of money is a loan, nor that the mutual liability of the receiver to refund is the true characteristic of a loan; and why should the sale of a note be placed on a different footing from the sale of any other article of property? Suppose a man buys a bill of exchange at a discount; is that a usurious loan, merely because of the contingent liability of the indorser if the acceptor should not pay? Or, suppose a man purchase a farm, and takes a deed with covenants, and is afterward evicted, the grantor is liable to refund the purchase-money, with interest; but this is not on the principle of a loan. So, in the purchase of a chattel, if the title fail, the vendor must return the money, but not on the principle that the money paid was a loan, or in the nature of a loan." Upon this class of reasoning, the judgment of the Supreme Court was affirmed (*Crane v. Hendricks*, 7 *Wend. R.*, 569, 616, 664; and *vide Ingalls v. Lee*, 9 *Barb. R.*, 647; *Burton v. Baker*, 31 *id.*, 241).

In a much later case an important rule is laid down in respect to the *intent* with which a transaction is entered into. The defendant, having a large debt against one who had assigned his estate in trust for creditors, applied to the assignees for a loan of \$12,000 from the trust-fund, until a dividend should be made; whereupon

the latter let him have notes belonging to the estate, which, estimating them at their nominal value, amounted to \$8,254.69, besides cash to the amount of \$3,745.31, and took defendant's note for \$12,000, with interest. The note not being paid, an action was brought to recover the amount of it. The defendant set up usury. The case was referred to referees, and on the trial evidence was given tending to show the notes which the defendant received to have been worth considerably less than he allowed for them. A majority of the referees reported that, on the testimony, they "*were of the opinion, as matter of law, that the said note was void for usury*, and therefore reported that there was nothing due the plaintiff." The plaintiff moved to set aside the report. "Per curiam: The case states the special grounds on which the two referees proceeded who agreed in making the report. They have not found any *intention* in the trustees of Rathbone to take usury, or that there was any *shift or device* to evade the statute. Indeed, they have not drawn any conclusions of *fact* from the evidence, but say they are of opinion, '*as matter of law, that the note was void for usury.*' In this we think they erred. The evidence does not necessarily, and as matter of law, make out the fact of usury; and there must, consequently, be a rehearing" (*Sizer v. Miller*, 1 *Hill's R.*, 227, 230). And to the same import is a late case in the New York Court of Appeals, wherein it was held that, where the transfer of a chose in action is coupled with a loan of money, though the security prove uncollectible, the transaction is not necessarily usurious; and that, in such case, the *onus* is upon the party alleging usury to show that the lender, at the time of the transfer, knew, or had reason to believe; that the security was uncollectible (*Thomas v. Murray*, 32 *N. Y. R.*, 605; and *vide Mumford v. American Life Insurance and Trust Co.*, 4 *ib.*, 463; *The Dry Dock v. The Same*, 3 *ib.*, 344).

A transaction was held not to be usurious where the facts were: The plaintiff sold the defendant a promissory note he held against a third party for a certain amount, with interest for a time over four months anterior to its date, for which he took the defendant's note for the amount, including the interest, computed according to its terms. The defendant not paying his note when it became due, suit was brought upon it, and the defense set up was usury. But the court held that a promissory note, for the payment of a particular sum, with interest from a day anterior to the date of the

note, in itself affords no evidence of usury; and, further, that it was not usurious, in selling a note payable at a future day, to take a note for the principal and interest of the note sold, computed to the day of sale, without making a *rebate* of interest. The court reasoned that, if the note was to be considered as evidence of usury lent at its date, there would, perhaps, be more than legal interest reserved; but, says the chief justice, "it is well known that notes are given for property sold, and upon other business transactions, as well as for money lent. Usury is a defense which must be strictly proved, and the court will not presume a state of facts to sustain that defense, when the instrument is consistent with correct dealing. If a merchant sell goods upon a credit of six months, and, after the sale, the purchaser gives his note, bearing interest from the time of sale, the transaction is an honest one. When an instrument will bear two constructions, one of which will render it operative and the other void, the former should be adopted. So when facts are to be presumed in relation to a contract, those should be preferred which render the instrument valid; it is sufficient, in this case, that a note so drawn is not necessarily usurious" (*Martin v. Feeter*, 8 *Wend. R.*, 533, 534).

In a case which came before the late Supreme Court of the State of New York, on demurrer to the declaration, the facts were, that the defendant held a promissory note for \$210, with interest, and one month after the date of it, by a memorandum indorsed on the back of the note, signed by him, *for the consideration* of \$200, paid to him by the plaintiff, assigned and transferred the note to the plaintiff, and *guaranteed* the payment thereof. The maker did not pay the note when due, and the action was brought against the guarantor to recover the amount paid for the note, with interest; the defendant resisted a recovery, on the ground of usury; but the court held that it was not a case of usury, and declared that the *transfer* and *guaranty* of a note for a *larger sum*, in consideration of a *less sum*, is not, *per se*, usurious; the guarantor in such case, when called on for payment, being liable only to *refund* the amount received by him, with the interest thereof (*Mazuzan v. Mead*, 21 *Wend. R.*, 285). The only difference, in *principle*, in this case and that of *Crane v. Hendricks* (7 *Wend. R.*, 569) is, that in the latter the defendant simply *indorsed* the note in suit, and it was held that the consideration advanced was, in construction of law, secured by the indorsement, and could be recovered;

whereas, in the former, there was a guaranty which is *absolute*, and a demand and notice are waived. True, the guaranty is equivalent to a direct promissory note, with superadded security; but the ordinary indorsement has the same effect; and in both cases the transaction is held not to be usurious, because it is that of a sale, and not a loan. The principle involved in these cases is important, for similar transactions are of almost every day's occurrence, in which bonds and mortgages are purchased for a sum less than that for which they were originally given, and transferred from one party to another by assignments containing covenants of guaranty, and in very many instances with collateral bonds as additional security. Such contracts, however, cannot be construed into loans of money to be adjudged void on the ground of usury, but, according to the spirit and true construction of the cases, must be sanctioned and upheld. Of course, the *maker* of the instrument cannot be affected by the terms under which the transfer is made; if valid in its inception, it cannot be infected by usury by the terms of any subsequent transfer. This doctrine is too well settled to require comment or citation of authority.

Numerous cases of the same tenor are to be found in the judicial reports of other States. In the State of Connecticut, where it was agreed between commission merchants of the city of New York and a country trader, that, on being furnished with a letter of indemnity, the city merchants would become responsible to a limited amount, and charge for lending their names, if put in funds in time to meet the payment, half *per cent*, and two and a half *per cent* in all cases of advance; and it appeared that the latter charge was intended by the parties as a fair compensation to the city merchants for their trouble in providing for acceptances, which it was the duty of the country dealer to pay, and not as a cover for a usurious loan; it was held by the Supreme Court of Errors that the commissions charged under such agreement were not usurious. Bissell, J., in delivering the opinion of the court, said: "Whether a transaction be or be not usurious is generally a question of *intention*; and that question is not only proper for the consideration of a jury, but is within their exclusive cognizance. At the same time it is not denied that a contract may be, *per se*, usurious. As if, for instance, more than the lawful interest be reserved on the face of a security for money loaned, and that be unexplained, the corrupt intent might be irresistibly inferred."

and it would be the duty of the court so to instruct a jury. But this is not that case. The contract is ostensibly a contract of compensation for the trouble and inconvenience of raising money to meet the debt of another. * * * The charge of one-half per cent was a compensation to the plaintiffs for the use of their names. They lent their credit, and their doing so for a compensation imposed on them no additional obligation to meet the drafts when they came to maturity. * * * Here the transaction was, on the face of it, a compensation for trouble. Whether such was the real motive of the transaction, or whether it was a case for a loan of money, and a contrivance to evade the statute, was a question of fact for the jury. * * * That question was distinctly put to them, and they have answered it. I see no reason for disturbing the verdict on this ground" (*De Forest v. Story*, 8 Conn. R., 513, 519, 520). In a later case in the State of Connecticut, where it was agreed between A. and B. that A. should indorse B.'s notes, payable at the bank from time to time, as B. should require, for the term of one year, to an amount not exceeding in the whole, at any one time, the sum of \$15,000, and should also during that time advise B.'s agent respecting his financial affairs, as far as he could consistently with his other engagements; and for A.'s indorsement and services B. was to pay him a sum equal to six *per cent per annum* on the amount of his indorsement, from the time such notes were given until they should be taken up by B.; the jury found that the contract fairly expressed the intention of the parties; that it was not designed by them to be a contract for the loan of money; and that the sum stipulated to be paid to A., for his indorsement and services, was no more than a fair and reasonable compensation therefor, having reference to the general embarrassments of the country at the time, and the kind of security agreed to be given; and the court held (1) that the contract was not, upon its face, usurious; (2) that the presumption resulting from the terms of the contract, and especially the peculiar manner in which A.'s remuneration was to be made, that it was designed as a cover for a usurious loan was repelled by the finding of the jury, and the transaction was therefore sustained. Said Waite, J., in delivering the opinion of the court: "Should it be said that great danger may be apprehended from the perversion of such contracts to usurious purposes, the answer is, that whenever they are so perverted they will be void. The intent of the

parties in making the contract must govern; and that is a question of fact to be determined by that tribunal whose business it is to pass upon such matters; and if a usurious intent is found, it will vitiate the contract." Still it was said that such contracts are so liable to be perverted to usurious purposes, that they are to be viewed with great jealousy (*Beckwith v. Windsor Manufacturing Co.*, 14 Conn. R., 594, 606).

And in a still later case in the State of Connecticut, where the action was against the indorser of a promissory note, the general doctrine in respect to the sale of business paper was reiterated. The payee of a negotiable promissory note for \$771.96, on time, indorsed by the defendant, transferred the same to the plaintiff at a discount equivalent to one and a half per cent per month for the time the note had to run. The note was not paid at maturity, and was therefore protested and due notice thereof given to the defendant as indorser, and the action was brought to recover the amount of the note of the defendant. The defense was usury. The court charged the jury that the transaction was not necessarily usurious, and that in case they should not find that the transaction was intended as a mere cover for a usurious and corrupt loan of money by the plaintiff, they ought to find for the plaintiff for the full amount of the note without any deduction therefrom; whereupon they returned a verdict for the plaintiff for the full amount of the note, and the defendant moved the Supreme Court of Errors for a new trial for a misdirection, which was denied. The court held that if a promissory note be good at its inception, and effective in the hands of the payee against the maker, it may be sold by the holder, like any chattel or other chose in action, for such price or rate of discount as the parties may stipulate for, without the imputation of usury. But if the note is made only to raise money upon, and is not to become effective until it is negotiated, the discounting of it at a greater rate than the lawful interest is treated as a loan by the indorsee, and will be considered as *prima facie* usurious. The distinction, therefore, is with reference to the question of usury between *business* and *accommodation* paper. The court further held, that though the purchaser of a promissory note may not be entitled to recover from the party from whom he received it a greater sum than the consideration paid, yet, in an action against a third person who indorsed the note as security of the maker, the rule of damages is the same

as against the maker, that is, the face of the note and interest. Church, J., in his opinion, said: "The inquiry therefore was, notwithstanding the form of the transaction, whether it was a loan of money by Baldwin to C. & H. Chapin, or the *bona fide* purchase of a business note at a discount. And this was a question of fact properly submitted to the jury. * * * Lamb, the present defendant, was no party to the consideration of the contract of sale; he came in only as additional security for the ultimate payment of the note. The jury have found that this note was originally a valid note, and that Baldwin was the *bona fide* purchaser of it. We see not, therefore, why he is not entitled to recover its full value, as well from the surety as he would have been if he had sued the makers." All of the judges concurred in this view of the case (*Baldwin v. Lamb*, 17 Conn. R., 441, 453). And indeed, this is in full accord with principles laid down by the Supreme Court of the United States. In a similar case before that court at an early day, it was declared that there are two cardinal rules in the doctrine of usury which must be regarded as the common place to which all reasoning and adjudication upon the subject should be referred; the first is, that to constitute usury, there must be a loan in contemplation by the parties; and the second, that a contract which in its inception is unaffected by usury can never be invalidated by any subsequent usurious transaction (*Nichols v. Feersen*, 7 Peters' R., 104).

In the State of Virginia it is held, that where the maker of a promissory note names no payee, and places it in that condition in the hands of an agent for negotiation, who sells it at a greater discount than the legal rate of interest to a purchaser who does not know that the note is sold for the maker's benefit, and the name of the purchaser is inserted in the note when it is delivered to him by the agent, or subsequently, the transaction is not usurious. So held upon the authority of an early case, which, it was declared, had settled the law of the State on the subject of usury in the purchase of negotiable paper; although it was conceded that the rule was contrary to decisions in many, if not most of the States. Reference was specially made to the prevailing doctrine in the State of New York, as being adverse to that under the Virginia statute as construed by the courts of the latter State (*Brummel v. Enders*, 18 Gratt. R., 873).

The case referred to as a controlling authority on the subject

was this: A firm by the name of Whitworth & Yancy made their negotiable promissory note payable to a firm by the name of Wilson & Orr, for the accommodation of the payees, who put it into the hands of one Belcher, a broker, for sale on their account, Belcher sold the note to the plaintiff at a discount of three per cent a month. The plaintiff, at the time he discounted the note, did not know that it was made for accommodation, nor for whose benefit it was sold. The note not being paid at maturity, the plaintiff brought his suit upon it, and the defense of usury was interposed. The court held that, as the plaintiff did not know that the note was made for accommodation, or that it was sold for the benefit of a party whose name was upon it, he was to be regarded as a *bona fide* purchaser from Belcher, the holder and apparent owner of the note, who did not indorse it, and that the transaction was, therefore, subsequently the same as the purchase of a business note. The result of this last conclusion of course was, that the transaction was not usurious; and so it was held by the court (*Whitworth v. Adams*, 5 *Rand. R.*, 333).

Reverting again to the State of New York, and to a case decided by the present Supreme Court of the State: S. & W. were commission merchants at Albany, and the defendants resided at Oswego, and were dealers in wool, sheep-skins and pelts, and had been in the habit of consigning wool and skins to S. & W. to be sold on their account. On the 18th of February, 1840, a contract was entered into between the parties, by which S. & W., on condition that they should have the selling of all the defendants' wool and skins, agreed to do it at a commission of five per cent; that they would advance, or accept, on two-thirds of the value of the property put into their hands; that they would then advance \$2,000 in cash for thirty days, at five per cent commission; that when drafts should fall due, if not in funds, they should be at liberty to sell the property at the market price, to meet the same; or, if they should advance the money to pay the same, they would charge five per cent on the advances. The court held that this agreement was not usurious, *per se*; that the transaction was not a *loan*, to be repaid in cash, like an ordinary loan, but was an advance made in the course of legitimate commission business, where extra charges, on money advanced, were sanctioned by law. Said Gridley, J., in delivering the opinion of the court: "Nevertheless, it *may be* a cover and disguise, under the name and pretense of such advances,

to get more than seven per cent for a loan of money. In other words, if this was a fair and *bona fide* transaction in the commission business, then wrong cannot be predicated of it; but if it was a disguised loan, under the cover and in the name of commissions, then it is usurious. * * * It is like the case of a loan of money with the sale of goods, where, on the face of the transaction, it may be fair and *bona fide*; but where it may be shown to be a disguised loan, by extrinsic evidence. * * * We, therefore, think it was incumbent on the defendants to give some evidence showing that the per centage was remarkably high, if they desired the court to hold the transaction usurious. The *onus probandi* was on them to show that the advances charged as commissions were loans in disguise. The evidence of usage, if such evidence existed, should come from the defendants" (*Seymour v. Marvin*, 11 Barb. R., 80, 83, 85). This case was decided upon authority, and mainly, perhaps, upon an early case in the old Supreme Court of the State, wherein it appeared that the plaintiffs charged a commission of two and a half per cent on the amount of money advanced to meet drafts when the defendants failed to send produce in time, and interest on the items charged in their account, from the time they became due. But it was found that the general usage was in accordance with this charge. Chief Justice Spencer, in delivering his opinion, says that there is no pretense for saying that the commission charged by the plaintiffs for accepting and paying the defendants' drafts, when the defendants had no funds in their hands, was usurious. He puts his decision on the ground that the commission business was lawful; and that it was only when an exorbitant charge was made, under the color of commissions, showing that the party intended, under that device, to get more than seven per cent for the use of his money, that the claim of usury could be supported (*Trotter v. Curtis*, 19 Johns. R., 161). This case has been usually quoted as a leading authority in similar cases which have arisen since it was reported. The judgment in the case in 11th Barbour was affirmed by the Court of Appeals (*Smith v. Marvin*, 27 N. Y. R., 137).

In a comparatively late case, in the Supreme Court of the State of New York, the same doctrine has been reaffirmed. A party held a bond and mortgage to secure \$2,000, and, for the consideration of \$1,800, sold and assigned the same, and, in effect, guaranteed the collection of the entire face of the bond and mortgage,

with interest. The mortgage was foreclosed, but there was a deficiency on the sale of the mortgaged premises of some fourteen hundred dollars; and an action was brought against the guarantor to recover this amount, with interest. The court held, that the contract of the defendant to the plaintiff, although in effect a contract to guarantee the payment of \$2,000, with interest, when in fact only \$1,800 was paid by the plaintiff on the assignment of the mortgage, was not void for usury, the transaction not assuming the form and character of a loan of money; but that the liability of the defendant on his covenant was limited to the sum of money actually paid to him by the plaintiff for the mortgage, with interest (*Goldsmith v. Brown*, 35 Barb. R., 484).

The same general principle seems to govern in case of exchange of promissory notes as in that of sales of such instruments. In a case in the old Supreme Court of the State of New York, it appeared that A. and B. exchanged notes of equal amounts, for the purpose of raising money, and one procured the note of the other to be discounted at a premium exceeding the lawful rate of interest. The note not being paid, the holder brought his action against the maker, and was permitted to recover the whole amount, with interest, on the ground that such a transaction is not usurious, and cannot be set up in bar of a recovery by the purchaser of the note against the maker. Savage, Ch. J., in giving the opinion of the court, said: "The only question is, whether this was a usurious transaction. According to the uniform decisions of this court, it clearly is not. The note was given for a valuable consideration; it was an available instrument in the hands of the original payees; there was no usury in its original inception, and, therefore, a purchase of it, or discounting of it, at a sum less than the face, does not taint the note itself with usury. Usury, to invalidate the note, must exist between the original parties to it; but when, as between maker and payee, the maker has received value for the note he gives, it is of no consequence to him what price the holder gave for it. He had value himself, and, therefore, must pay it" (*Rice v. Mather*, 3 Wend. R., 62, 64, 65). And this same doctrine has been affirmed by the New York Court of Appeals (*Vide Cobb v. Titus*, 10 N. Y. R., 198).

And the Supreme Court of Alabama, in pursuance of the well recognized rule, has held that where parties make an exchange of promissory notes, or other securities, for money, they may stipu-

late *bona fide* for an allowance of premium by one to the other (*Andrews v. Jones*, 10 Ala. R., 400).

CHAPTER XI.

TRANSACTIONS NOT USURIOUS FOR THE WANT OF THE ELEMENT OF A LOAN — CONTRACTS IN THE FORM OF COMPENSATION FOR SERVICE — CHARGES FOR REASONABLE COMMISSIONS ON MAKING LOAN — LOANS UPON CONDITION THAT DEBT OF THIRD PERSON BE ASSUMED, OR THAT A SUBSISTING DEBT OF THE BORROWER BE PAID.

THE question of usury is often involved in cases where a commission has been charged for labor and trouble in procuring a loan of money for the borrower, instead of nominally including the same as a provision for the loan. The disposition of the courts in respect to such transactions will be seen by a reference to some of the cases which have been held not to be usurious, because not necessarily involved in a loan. An important case of this description has been recently decided by the New York Court of Appeals. The facts were, that one Webb applied to the defendant, at his place of business at Elmira, to accept for his accommodation, to enable him to raise money. The defendant wrote his acceptance on the draft of Webb and delivered it to him. Webb then applied to one Dewey to indorse the draft and get it discounted for him, and agreed to pay him fifty dollars for the service. Dewey indorsed the draft, and then procured another indorser, and procured the draft to be discounted, and of the avails took out his fifty dollars, and paid over the balance to Webb. The draft not being paid at maturity, the defendant was fixed as an indorser, and sued for the amount of the draft. The defense was usury. The judge at the circuit instructed the jury to inquire whether the paper was negotiated in the first instance to Dewey, and said if it was, it was usurious in the hands of the plaintiff as subsequent indorser; but, if it was discounted in the first instance by the bank, Dewey acting as agent, and indorsing for Webb's accommodation and procuring Smith's indorsement, the exacting of fifty dollars for so doing did not make the draft usurious. The defendant's counsel excepted, and the jury found for the plaintiff. The judgment was affirmed at a General Term of the Supreme Court, and the defendant appealed to the Court of Appeals, where the judgment was affirmed;

the court holding that the payment of fifty dollars by the drawer of the bill to an accommodation indorser for his indorsing, procuring another indorser, and obtaining its discount, did not taint the draft with usury. Denio, J., in delivering the opinion of the court, said: "The evidence is uncontradicted that Dewey acted in what he did as Webb's agent, and not as the purchaser or holder of the paper. It is true that, in making title to the bill, when pleadings were technical, the plaintiff would have set out an indorsement and delivery by Webb to Dewey, and by the latter to the bank, and would thus have stated, in effect, that Dewey was at one time the holder, and then, inasmuch as he paid fifty dollars for his connection with its negotiation, it might be said that the bill was infected with usury. But, in inquiring at what stage of a transaction respecting a negotiable bill or note it became operative as commercial paper, successive indorsements are not necessarily regarded as separate transfers of the paper; but the inquiry is, in what hands it first became available in a sense which would enable that party to maintain an action upon it against the prior parties. One who indorses for the accommodation of a prior party does not thereby become the holder of the bill, nor can he maintain an action upon it until he has taken it up by paying the amount to a subsequent purchaser. The fact that the plaintiff placed the proceeds of the discount to the credit of Dewey was of no materiality, after it was shown that the latter acted in procuring the discount as the agent of Webb, and not as the owner of the paper.

The defendant's counsel relies upon the case of *Steele v. Whipple* (21 Wend., 103), as showing that, under circumstances like those here disclosed, the paper would be usurious in the hands of the bank, and it must be admitted that the reporter's note favors that conclusion. But on looking into the case, it will be seen that the note overlooks the true point decided. * * * The principle really decided has been questioned, if not overturned, by subsequent cases; but as the point is foreign to the present question, it is unnecessary to pursue the subject. * * * The court, in the present case, left it to the jury to say whether Dewey became the holder of the note by means of the loan to Webb while it was in his hands, and they found he did not. I doubt whether the evidence would have justified the submission, but the defendants have no cause to complain of it. * * * None of the defendants' positions appearing to be well-taken, the judgment of the

Supreme Court must be affirmed" (*Van Duzer v. Howe*, 21 *N. Y. R.*, 531, 533, 534, 539).

This case was followed in a later case in the same court, where it was ruled that, where the maker of a promissory note pays a consideration to a party to indorse said note, and to procure its discount at the bank, such transaction does not constitute a usurious agreement, and that the bank discounting such note in good faith can recover the same of the maker thereof (*Chatham Bank v. Betts*, 37 *N. Y. R.*, 356).

In the old Supreme Court of the State of New York, where a creditor at the request of the debtor, and upon his express promise to pay the expenses, took a journey to the residence of the latter with a view to settle the demand, and afterward included such expenses in a security taken for the debt, in an action brought upon the security, the defendant set up as a defense usury, because the traveling expenses of the plaintiff were included in the bill; but the court held that the security was not for that reason usurious. Bronson, Ch. J., in delivering the opinion, said: "We are referred to *Williams v. House* (7 *Paige*, 581), as an authority to prove the bill void for usury. But in that case one-half of the expenses of the creditor's journey were included in the mortgage when the journey had not been made at the request of the debtor nor upon any promise to pay the expenses, while here the journey was made at the request of the company, and upon its express undertaking to pay the expenses. The \$7.50 might have been recovered from the company, although no arrangement in relation to the original debt had been made. It was so much money paid, laid out and expended for the company upon request, and was as much a debt as was the original demand. There was no usury" (*Harger v. McCullough*, 2 *Denio's R.*, 119, 121, 122).

And in a very late case decided by the New York Court of Appeals, the principle laid down was even more emphatic. The action in the Supreme Court was against principal and sureties, on a promissory note for \$412 and interest, payable in one year, made to the plaintiff for money loaned, but included the sum of twenty-one dollars and fifty cents reserved as compensation for the plaintiff's services and expenses in collecting the money necessary to complete the amount to be loaned; and the plaintiff testified that such services were rendered at the request of the borrower, and upon his express agreement to pay therefor. The

defense was usury. The evidence being closed, the defendants' counsel requested the court to direct a verdict for the defendant, on the ground that, as matter of law, and on the plaintiff's own evidence, the defense of usury had been made out, which the court declined to do, and the defendant excepted. The court charged the jury that if the excess over seven per cent was taken exclusively for expenditures of time, services and money in obtaining the money to be loaned to defendant, without any intention to evade the statute against usury, and if the amount thus taken was not more than a reasonable charge for such expenditures, and if they were made at the borrower's request, and on his promise to pay therefor, then the note was not usurious; to which the defendant excepted. The defendant requested the court to charge the jury that it was usury for the plaintiff to take even the actual expenses in collecting her own money to loan to defendant, when those expenses brought the sum paid for the loan to more than seven per cent; also, that it was usury for the plaintiff to take anything more than the actual expenses as a personal compensation for collecting the money; also, that if the extra money paid was, in the mind of the plaintiff, an inducement to make the loan, it was usury; each of which requests was refused by the court, and the defendant excepted. The jury found a verdict for the plaintiff for the full amount of the note, with interest. A motion for a new trial was made by the defendant at Special Term, and denied. The order denying such motion was affirmed at General Term, and the defendant appealed to the Court of Appeals. The case was elaborately argued in the latter court, and the order appealed from unanimously affirmed. Dwight, J., in delivering the opinion of the court, said: "We have, then, in brief, the following case presented: The defendant, Cornell, a stranger to the plaintiff, procures himself to be introduced to her, finds her sick in bed, and proposes to borrow \$400, offering satisfactory security. The plaintiff has but about half the desired amount on hand, and, when it is suggested that she has money due her in a neighboring village, she admits that she has, but says that it is in good and safe hands; and that she does not wish to change it; the defendant urges his pressing necessities, appeals to her to save him from the loss of his property, which, he says, must ensue if he does not obtain the loan, and offers to compensate for her trouble and expense if she will go to Waverly and collect in this money, in order to loan it

to him ; she hesitates to undertake the task on account of her ill health, but finally consents to make the effort for five per cent on the amount. She goes to Waverly three times, hiring a conveyance each time, sends a messenger twice, collects money from four different persons, is compelled to resort to borrowing to make up the full amount, and to apply to several persons before obtaining the loan, and then finally completed the amount to be loaned to Cornell. Her health having been injuriously affected by the travel and exertion involved in the business, which was more than she anticipated when she undertook it, she calls Cornell's attention to the fact, and suggests she ought to have increased compensation. Cornell admits the justice of the claim, and consents to increase the compensation to six per cent. The money was paid, less the compensation agreed upon (\$21.50), and the note is taken for the full amount, with interest. The plaintiff testifies, under objection, that her intention, in stipulating for this sum reserved, was to get compensation for her trouble and expenses in running about and collecting and borrowing the money, and that she did not take it for the use or forbearance of the money loaned. The court was asked, upon this evidence, to direct a verdict for the defendant, on the ground that, as matter of law, the defense of usury was established, and the question is fairly presented, by the refusal of the court, and the several refusals to charge, whether the lender of money may lawfully receive from the borrower a reasonable compensation, in excess of interest, for services and expenditures in procuring the money to be loaned, provided the services were performed and the expenditures incurred at the request of the borrower, and upon his express promise to pay therefor. Upon this question there can be no doubt. The compensation thus received is distinct from that agreed to be paid for the loan or forbearance of the money. The latter is interest, and cannot lawfully exceed seven per cent ; the former is a stipulated price for work, labor and services done and performed, and for money paid, laid out and expended ; as such, it constitutes a distinct demand, which might be recovered in a separate action, if not included in the security taken for the principal debt. Indeed, in this case, there is no doubt it might have been recovered in an action on the agreement, if the principal debt had not been increased, or if, for any reason, the defendant had declined to accept the loan after the money had been raised for him by the plaintiff. * * * In the

numerous cases where the owners of real estate, in growing communities, cut it up into lots and offer to purchasers to loan them money to be expended in improvements, the sale of the lots is a condition of the loan; but, even though the price thus obtained for the property is larger than it would have brought but for the loan thus accompanying it, yet if the transaction be, in good faith, what is here described, it would be absurd to pronounce it usurious. So, too, the hiring of services may be made the condition of a loan for money; as, where a clerk or salesman, having some capital, and seeking employment, makes it a condition of loaning his money that he shall be employed at certain wages. The contract would not be usurious, unless it should be found that the price put upon the services was, in fact, intended as a cover for obtaining unlawful interest for the money loaned. In all these cases we arrive at one result, viz., that the character of the transaction depends upon the intention of the parties, and that is a question for the jury. The rule applies to the case at bar, and the instruction given to the jury was strictly correct. The same reasoning, also, disposes of all the defendant's exceptions to the several refusals of the court to charge as requested. The only one of these exceptions which it can be necessary to notice further is that to the refusal of the court to charge 'that if the extra money paid was, in the mind of the plaintiff, an inducement to make the loan, it was usury.' This might seem, at first sight, to be substantially equivalent to the proposition that if the extra money was received by the plaintiff, in any manner, as compensation for the loan, then it was usury. The latter is a correct proposition, and was, in substance, charged by the court. But the proposition contained in the request to charge was a different one. According to the testimony of the plaintiff, which the jury seem to have believed, the extra money paid was, in one sense, an inducement to make the loan, and yet was not received, in any measure, as compensation for the use of the money. It was an inducement to make the loan, in that it induced the plaintiff to incur the extra trouble and expense without which the loan could not have been made. But, in this view, it was distinct from the compensation for the loan itself, and, hence, was not usury. This request to charge was, therefore, properly refused. * * * I do not think there was any error in the rulings of the court, in the admission of evidence. * * * In this case, to find a verdict for the plaintiff, under the

charge of the court, the jury must have found that the sum reserved by her, upon the face of the note, was taken exclusively for the expenditures of time, services and money in obtaining the money to be loaned to Cornell, without any intent to evade the statute against usury; that those expenditures were made at the request of Cornell, and upon his express promise to pay her therefor; and that the sum reserved was not more than a reasonable compensation for such expenditures. Such being the findings of the jury, and no error appearing in the rulings or the charge of the court, the motion for a new trial was properly denied" (*Thurston v. Cornell*, 38 *N. Y. R.*, 281, 283-288). These liberal extracts are made from the opinion in the case of *Thurston v. Cornell*, because of the importance of the case, and because certain principles seem to be carried further, in the decision of the case, than in any previous cases to be found in the New York reports. To be sure, many interesting items in the opinion are *obiter*; but, as none of the judges manifest any dissent, it is fair to conclude that they were concurred in, and that they will, most likely, be recognized in future adjudications. The case itself, however, settles the principle that a party may lawfully take from the borrower a reasonable compensation, in excess of interest, for services and expenditures in procuring the money to be loaned, when there is no intent to evade the law; and that it is competent for the lender of the money to testify as to what his intention was. This doctrine is more clearly and directly presented in this than in any previous case; but it is, nevertheless, quite reasonable, and in accordance with the general policy of the law.

In a somewhat earlier case, in the same court, a similar doctrine, in one of its aspects, was laid down. The action was brought in the Supreme Court, against the maker and indorser of a promissory note. The note in suit was bought in renewal of one for \$600, made in July, 1857, by one Burpee and John P. Alger, and payable to one Clark, or bearer. The circumstances under which the last mentioned note was given were these: In July, 1857, Clark (who resided at Newport, New Hampshire, but was temporarily staying at Saratoga Springs) was applied to by Burpee, at the Springs, to lend him \$600, which he stated he wanted to pay a note he was then owing at the savings bank, Springfield, Vermont. The security he proposed was satisfactory, but Clark informed him that he had not the money with him; that it was at

Newport, in the bank; and that it would be attended with considerable trouble and expense to go after it. Burpee inquired as to the probable expense, and was told twenty-five dollars at least, and he said he would give him (Clark) twenty-five dollars if he would go and get him the money, and, as he wanted it to pay out at Springfield, he would meet him (Clark) at Bellows Falls the following Friday, and bring a note with one or more names to it of persons (among them John P. Alger) that had been suggested as sureties. Clark promised to go immediately, and did go the next morning to Newport, and from thence to Bellows Falls on Friday, and there remained waiting for Burpee until the next morning, when he went back to Newport, stayed there over Sunday, and returned to Saratoga on Monday. He paid twenty dollars for the expenses of the trip. On his return to Saratoga he met Burpee at John P. Alger's house, and let him have the money, taking a note therefor of \$600, made by Burpee and Alger. After Burpee had received the money and was about leaving, Clark said to him, "Burpee, what about the matter of expenses?" when Burpee replied, "I do not want to give you the money to-day, but will give you my note on demand, and pay it in a short time." Clark wrote a note for twenty-five dollars, and Burpee signed it. The defense was usury, and on these facts the Supreme Court adjudged that the plaintiff had himself shown the note to be usurious, and accordingly nonsuited the plaintiff. The Court of Appeals held this to be a plain error. Wright, J., who delivered the opinion, said: "The evidence tended to show that the twenty-five dollar note (which, it was claimed in the pleading, was without any legal consideration, and rendered the \$600 note void for usury) was given to repay Clark for trouble and expense incurred by him, at the request of Burpee, the borrower, in going to Newport for the money, and that the amount of the note was only two or three dollars more than the actual expenses of the trip. If this were so, there was no usury. But, manifestly, the case did not disclose a transaction usurious *per se*. Whether or not the trip to Newport for the money was intended as a cover for usury, was a matter for the consideration of the jury. If the jury believed that it was undertaken in good faith, at Burpee's special request, and upon his promise to reimburse for the trouble and expense of the journey, then the taking of the twenty-five dollar note did not render the transaction usurious. Even when the lender, without any special

agreement with the borrower, in addition to lawful interest, takes a commission for trouble and expense necessarily incurred in and about the business of the loan, the transaction would be supported, provided such commission was not intended as a device to cover a usurious loan" (*Eaton v. Alger*, 2 *Keyes' R.*, 41, 46, 47; and *vide Flint v. Schomberg*, 1 *Hilton's R.*, 532). The Superior Court of the city of New York has recently held that it is not usury for a lender of money on bond and mortgage, in good faith, and not as a cover, to take from the borrower the necessary disbursements for searching the title to the premises mortgaged.

The facts were these: Reed made a mortgage to Wolcott, to be used by the latter to borrow money for the former; Wolcott transferred the mortgage to Eldridge, and received the full price thereof as a loan upon the security of the same, which money he delivered to Reed, less a certain sum retained by him for his services and expenses incurred in searching titles. The court held that the mortgage had no inception in the hands of Wolcott, and that a retention by him of such sum for services did not make the loan or mortgage usurious in the hands of Eldridge; and it was declared that if the notes and mortgage in suit were, as was claimed by the plaintiff, not of a transaction virtually between Reed, the defendant, and Eldridge, the discounters of the notes, through Wolcott, the agent or middle man, in order to raise money to take up other notes, or for any other purpose, then, no matter how much money Wolcott might have stipulated for or received, it would not be usury as against the party taking the notes and mortgage and advancing the money thereon, unless he was also a party to the usurious contract. This was stated as a familiar principle, and well settled by authority (*Eldridge v. Reed*, 2 *Sweeny's R.*, 155, 160).

The same general doctrine of these New York cases has long been recognized in England. Thus, an indenture, assigning to the plaintiffs a contract for the purchase of timber, upon certain trusts for securing to themselves out of the proceeds the repayment of the purchase-money advanced by them, and also of a certain balance before due to them, together with interest thereon, at five per cent, up to the time of payment; and also the sum of £200, as compensation for the trouble that they might be put to; and also all costs, charges, etc., which they might incur on account of the premises, was held by the English King's Bench not to be a

usurious agreement upon the face of it; that it was not necessarily to be intended as a colorable reservation of further interest beyond the legal rate, but as a compensation for trouble, etc.; neither was it so excessive as to be intended usurious upon that account (*Palmer v. Baker*, 1 *Maule & Selwyn's R.*, 56).

A similar rule was laid down in the English Court of Chancery. A motion was made for an injunction to restrain the sale of a cargo in the London docks, and an objection was taken to a claim of lien for commission upon a transaction which, by the accounts that were produced, appeared to be of this nature. Hanson, the person making the claim of commission, having advanced money upon the terms of receiving interest at five per cent, took bills upon Hamburg, which bills he sent there for the purpose of procuring acceptance and payment, and a remittance of the amount. The commission was charged upon that transaction, and it was contended, in support of the motion, that it was usurious. The motion was denied, on the ground that a reasonable commission, beyond legal interest, for extra incidental charges and the like, is not usurious. The lord chancellor said: "I take the facts of this case, as far as I can understand them from the accounts that have been handed up, to stand thus: Hanson advanced money to these parties upon the terms of receiving interest; desiring them, if they had bills upon Hamburg, to put them into his hands for the purpose of sending them there to procure acceptance and payment, in order to bring himself home, taking a reasonable commission for his trouble in doing so. That, according to modern doctrine, is not usurious; therefore, I cannot make the order prayed upon this motion" (*Haynes v. Fry*, 15 *Vesey's R.*, 120, 121; and *vide*, also, *Burden v. Parry*, 2 *Term R.*, 52).

And, in the State of Connecticut, similar decisions have been made. In a comparatively late case, the Supreme Court of Errors of that State went the full length of the New York cases. The action was upon promissory notes indorsed by the defendant; and the defense was usury. It appeared that the maker of the notes made an arrangement with the plaintiff to take the notes and get them discounted for him, for which he agreed to pay him a reasonable compensation for his trouble and expense. He took the notes and tried to get them discounted, but could not; whereupon he got his own note discounted by pledging other securities, and received the money and took the notes; and, for his trouble and

expenses in procuring the money, the maker of the notes agreed to pay him fifty dollars, which was no more than a reasonable compensation for his trouble and expenses. The arrangement was made in New York. The defendant requested the court to charge the jury that if the extra sum was paid to the plaintiff to lend the money or to procure a loan, if he lent the money himself and received more than seven per cent for it, the loan was usurious and void. The court charged the jury as follows: "The notes in question are governed by the law of New York, which makes all securities void when more than seven per cent per annum is taken for the loan of money. It is essential, to constitute the transaction usurious, that there should have been a corrupt agreement between the parties, with an intent to avoid the statute. The test of such a transaction is, whether it is merely a loan of money, whatever may be the form of the contract; for, when the substance of the transaction is a loan of money, no artifice, device or shift will evade the statute. Promissory notes are the subject of sale, like personal chattels; but if the note is made only to raise money, and is not to become effective until it is negotiated, a sale for less than its apparent value will be *prima facie* usurious, and it will devolve on the purchaser to show that the transaction is not tainted with usury. A charge of commission beyond the legal rate of interest, for the trouble of discounting a note or procuring a loan of money, is not usury, provided it be a fair and reasonable compensation; but if such compensation should be unreasonable and extravagant, it will furnish a presumption that the transaction is usurious; and whether the transaction be of this character or not is a question of fact for the determination of the jury." The jury returned a verdict for the plaintiff, and the defendant moved for a new trial, for error in the charge of the court. After full consideration the motion for a new trial was denied. Hinman, Ch. J., in giving the opinion of the court, said: "The only question in this case arises upon that part of the charge in which the jury were told that a charge of commission beyond the legal rate of interest, for the trouble of discounting a note or procuring a loan, was not usury. The facts to which the charge applied are very similar to the facts in the case of *Hutchinson v. Horner* (2 Conn., 341), where the same doctrine was expressly sanctioned by the court. And that such is the law of Connecticut is admitted by counsel, as it certainly ought to be after this express decision,

subsequently sanctioned and uniformly acted upon (*De Forest v. Strong*, 8 Conn., 513; *Beckwith v. Windsor Manufacturing Co.*, 4 ib., 604). But as this was a New York transaction, it is claimed that the same rule does not exist there; and the question arises, therefore, whether there is any difference in this respect between our own laws and the laws of New York. The general principles as to what constitutes usury are the same in both States, and also in England, though the rate of interest is different. Hence the English cases are always cited and relied upon in New York as well as with us; and we suppose it to be very well settled that under the English statutes it is lawful to take the customary commission or exchange on bills or notes, and reasonable incidental expenses, over and above the interest. * * * The facts of this case bring it clearly within this principle. The plaintiff did not charge the commission for the loan as made by himself; indeed, it was not, when the service was rendered, contemplated that he was to loan the money at all. He came to Connecticut for the purpose of raising the money from others on the defendant's paper, but, finding that he could not do this, he determined to raise the money himself. Now, why should he not be paid for the service rendered at the defendant's request, and for his expenses while engaged in it?" (*Beadle v. Munson*, 30 Conn. R., 175, 178, 179).

A similar doctrine has been recently declared by the Supreme Court of Illinois, in a case in which it was held that a bill of exchange stipulating for the payment of "costs of collecting, including attorney's fees," is not usurious (*The First National Bank of Martinsville v. Canatsey*, 34 Ill. R., 149). And the same doctrine has often been recognized by the Supreme Court of Indiana (*Vide Gambril v. Doe*, 8 Blackf. R., 140; *Billingsby v. Dean*, 1 Ind. R., 331; *Smith v. Silvers*, 32 id., 321; *Smith v. The Muncie National Bank*, 29 id., 158).

Akin to this doctrine, the Court of Appeals of the State of New York have recently held, that the fact that upon a loan of money the lender exacts, as a condition of his making the loan, that the borrower should secure to him the payment of a subsisting and genuine debt due him from a third person does not, *per se*, render the loan usurious. The action in the court below involved the validity of certain promissory notes given upon a loan of money, which included not only the amount of the money loaned, but \$483.02 claimed by the lender to be due him from a third

person; and it appeared in evidence that the lender made it a condition of the loan that the borrower would undertake to pay the indebtedness of such third person, and include the amount in the securities, and the borrower assented to the arrangement. The transaction was held usurious and void by the referee before whom the trial was had; an appeal was taken to the General Term of the Supreme Court, where the judgment of the referee was reversed; and an appeal was taken to the Court of Appeals and the judgment of reversal was affirmed. Lott, J., in his opinion said: "Assuming that the notes of the defendant were given to the plaintiff and accepted by him as a loan of money, the transaction as found by the referee cannot be considered usurious. He has fully set forth the facts on which he found, 'as a matter of law, that said loan of money and said notes given therefor, and the said mortgage, were usurious and void.' They are substantially that the defendants, on an application to them by the plaintiff for a loan of money to discharge an indebtedness by him to divers persons, including a debt to themselves, consented to lend the money wanted, among other terms, 'upon the further condition that the said plaintiff would in consideration of such loan undertake to pay to the said defendants the sum of \$483.02, claimed by the said defendants to be due from Henry Jones to them, the said defendants,' the particulars of which claim were set forth, 'and then and there makes his promissory note for said amount,' and secures the same with the notes to be given for the amount of the said indebtedness by the said mortgage; that the plaintiff acceded to the said terms and made the notes and executed the mortgage which he seeks to cancel. He does not find as a fact, or set forth any circumstances warranting or tending to warrant the conclusion, that the debt of Jones was not due, or that the assumption of it was demanded or insisted on in any way, as interest for the loan, or with the intention of taking usury, or as a shift or device to cover it. The fact, and the only fact on which, 'as a matter of law,' he decides the loan to be usurious and void is, that the defendants refused to make the loan asked by the plaintiff unless the payment of the Jones debt was assumed by him and secured by the mortgage. Such a refusal did not, *per se*, make the transaction usurious, and that fact being as before stated the only one found, no other will be presumed to sustain a conclusion that the agreement was corrupt and void. It must be considered the settled

rule of law in this State, that the *onus* is upon the party seeking to avoid an agreement as usurious, not merely to establish a usurious intent, but to prove facts from which that intent is to be deduced" (*Valentine v. Conner*, 40 *N. Y. R.*, 248, 252, 253). And the Supreme Court of the State had previously held, that an agreement by a borrower to pay a subsisting debt of his own in consideration of a new credit is not usurious, if the promise is to pay only the amount actually due on the old debt, and the amount of the loan with lawful interest (*Marsh v. Howe*, 36 *Barb. R.*, 649).

The Court of Appeals of the State of New York have just held, in a case not yet reported (August, 1872), that a loan is not necessarily usurious by reason of its constituting part of an agreement between the parties, where, irrespective of the loan, both parties are desirous of entering into the contract for their mutual advantage. And further, that the mere fact that as part of the arrangement a loan is made by one to the other at the legal rate of interest to enable him to perform his part, does not present a case of usury, though the loan would not have been made except as a part of the contract, or even though the contract would not have been made without the loan. And it was also held, that the mere fact that a loan of money or interest is the consideration for another contract, is not in all cases conclusive evidence of usury. But it was said that if by the collateral contract some benefit is secured to the lender, for which the borrower does not receive an equivalent, and which the lender would not have obtained except for the loan, and which is intended as an additional compensation for the loan, it is usury (*Clark v. Sheehan*, 6 *Alb. L. Jour.*, 126).

CHAPTER XII.

TRANSACTIONS NOT USURIOUS — COMPENSATION TAKEN ON ACCOUNT OF EXCHANGE — MAKING DEPOSITS IN CONSIDERATION OF A LOAN — TAKING INTEREST IN ADVANCE.

CASES involving similar principles to those considered in the preceding chapter are those in which charges are made over and above legal interest for exchange, and the universally settled rule of law seems to be that a charge for exchange, unless used as a cover for usury, is legal and not usurious. A few only of the leading

cases holding this doctrine, and wherein the transactions were decided not to be tainted with usury, will be referred to. Several cases of this nature have been before the Supreme Court of the United States, in which the decision was in favor of the legality of the transaction. For example, in one case, a banking institution, having power to deal in exchange, took a mortgage to secure the payment of a loan to the mortgagor, in which was reserved a certain amount over and above legal interest, alleged to be according to the usual and customary prices of exchange between Cincinnati, where the bills were drawn, and New Orleans, where they were payable at the times they were discounted, although it was conceded that the rates were higher than were charged on sight bills. The Circuit Court of the United States for the district of Ohio, in which the action was brought, held that the transaction was not usurious, and declared that it was not usury in a bank which has power by its charter to deal in exchange to charge the market rates of exchange upon time bills, and an appeal was taken to the Supreme Court of the United States, where the decree of the Circuit Court was affirmed. Mr. Justice Curtis, in delivering the opinion of the court, said: "The power of the banking corporations to deal in exchange is not controverted. There is no usury on the face of any one of these transactions. It is incumbent on the party who charges usury to prove it; and where it is alleged to consist in taking excessive rates of exchange, or in resorting to the form of a bill of exchange in order to keep out of sight a usurious compensation for the simple loan of money, those facts must be proved. * * * The answer of each bank denies such intent, and avers that the exchange charged in each case was the customary and regular rate at the time of the discount of such bill. There is no evidence to prove the contrary. * * * The counsel for the appellants urged that the rates were higher than were charged on sight bills. But these were time bills, and it is no proof of usury that the banks did not take the market rates on sight bills, which they did not discount, if they took only the market rates on those they did discount. It was also insisted that the banks did not buy those bills, but were the first takers, for loans of money made to the drawers. But we are unable to perceive how the fact that the banks were the first takers can be of any importance in this case, nor do we deem it material that the bills were discounted for the drawers. The reason why the addition of the current rate of

exchange to the legal rate of interest does not constitute usury, is that the former is a just and lawful compensation for receiving payment at a place where the money is expected to be less valuable than at the place where it is advanced and lent; and this reason exists when the lender discounts the drawer's bill as well as when he buys a bill in the market of the payee. In neither case is it usury to take the regular and customary compensation for the loss in value by change of place of payment (*Buckingham v. McLean*, 13 How. U. S. R., 151, 171, 172).

The whole question was examined in an earlier case in this same court, and the same rules were laid down. The action was brought in the Circuit Court of the United States for the southern district of Alabama, to recover the amount of a bill of exchange which was taken, in New York, in payment of a debt due on a protested bill from one of the parties to the protested bill. The bill was drawn on parties residing in the State of Alabama, and payable and negotiable at the Bank of Mobile sixty days after date. The exchange between Mobile and New York was stated to be ten per cent, and was added to the bill, and the damages in the protested bill were also added. The bill was sent to Mobile and placed to the credit of the drawees by the indorser, who received it before it came to maturity. It was afterward protested for non-payment. The defendants alleged usury in the bill; the rate of exchange allowed in the bill, being ten per cent, was proven, and it being alleged that the highest rate of exchange in Mobile did not exceed five per cent. The defendant proved by one witness that the exchange between New York and Mobile at the time in question was from five to seven per cent, and by another that it was from three to five per cent; three for short and five for long paper. The plaintiff offered to prove that there was no fixed rate of exchange between Mobile and New York; that it varied from one to twenty per cent, according to the solvency, punctuality and risk of the parties; that exchange was ever fluctuating, and was high or low, as the risk was great or small. The court refused to accept this testimony, and the plaintiff excepted. The plaintiff asked the court to instruct the jury that if they were satisfied that the excess over legal interest retained in this bill was taken and contracted for innocently by the parties, without intending to violate the laws against usury, they might find for the plaintiff. The court refused to give the instruction and the plaintiff excepted. Other

instructions were asked by the plaintiff and refused, which it is unnecessary to note, because not material to the question under consideration.

Upon the whole case the court charged the jury that if they believed from the evidence that by the usages of trade between New York and Mobile there was an established rate of exchange between those places, the drawers and drawees of the bill of exchange here sued on had a right to contract for such rates of exchange; and that even a higher rate to a small amount, if, under the circumstances, it did not appear to have been intended to evade the statute against usury, might be allowed by them; but if they believed that no such usage existed, the parties had no right to contract for more than the actual expense of transportation of specie from one place to the other, including interest, insurance, and such reasonable variations therefrom, as above stated; and further, if they believed from the evidence that the drawees of the bill of exchange contracted with the drawers in the State of New York, at the time the bill was drawn, for a greater rate of interest than seven per centum per annum for the forbearance of the payment of the sum of money specified in the bill, although it may have been taken in the name of exchange, the contract was usurious and they ought to find for the defendant; otherwise for the plaintiff; to which charge the plaintiff excepted. The jury found a verdict for the defendant, and the plaintiff brought error. The case was ably argued in the Supreme Court of the United States, and after due deliberation, the judgment of the Circuit Court was reversed, and it was held that, although the transaction, as exhibited, appeared, on the face of the account for which the bill was drawn, to be free from the taint of usury, yet if the ten per centum charged as exchange, or any part of it, was intended as a cover for usurious interest, the form in which it was done, and the name under which it was taken, will not protect the bill from the consequences of usury; and, if this fact was established, it must be dealt with in the same manner as if the usury had been expressly mentioned in the bill itself. But whether the charge of ten per centum for exchange between New York and Mobile was intended as a cover for usury, was a question exclusively for the jury. It was a question of intention; and, in order to enable the jury to decide whether usury was concealed under the name of exchange, evidence on both sides ought to have been admitted which tended to

show the usual rate of exchange between New York and Mobile when the bill was negotiated. But there was no rule of law fixing the rate which may be charged for exchange; it did not depend on the cost of transporting specie from one place to another, although the price of exchange was no doubt influenced by it. Mr. Chief Justice Taney, who delivered the opinion of the court, said: "In fine, if the parties intended to allow no more than a fair rate of exchange, testing it by the market price of good bills of this description, it was not usury, and the plaintiff is entitled to recover; if, on the contrary, more was intended to be taken, it was usury, and the plaintiff is not entitled to recover." And because the Circuit Court had excluded evidence offered by the plaintiff pertinent to this issue, and the case had not been submitted to the jury in strict accordance with this view, the judgment of the Circuit Court was reversed (*Andrews v. Pond*, 13 *Peters' R.*, 65, 80).

The question has frequently been before the courts of the State of New York, and the principle is there well settled, that the including a premium in excess of interest in a contract, as the difference in the rate of exchange between the place where the contract is entered into and the place of payment, does not render the transaction, *per se*, usurious. One of the earliest cases of this description arose in the old Supreme Court, wherein it appeared that the action was against the defendant as the indorser of a promissory note which was given for the balance of a previous note held by the plaintiff against one Petrie; which last mentioned note was given under the following circumstances: On the 12th of June, 1827, Petrie purchased of the plaintiff, at New York, where he carried on the business of a merchant, a bill of goods amounting to \$308.77, for which he gave his note, payable in six months, including \$10.82, the interest on the amount of the bill of goods. On the 12th March, 1828, the note remained unpaid, and the true amount due thereon at that date, including interest, was \$325.18. Interest was then cast on that sum for sixty days, *as the one-sixth of a year*, and the amount thereof, together with \$3.03, the *difference of exchange* between Utica and New York (being *one per cent* upon the whole amount), added to \$325.18, made the sum of \$332.28. Petrie paid twenty-eight cents, and gave his note for \$332, payable at Utica, for his accommodation, he residing at Little Falls, in the vicinity of Utica. The defendant,

who was an accommodation indorser, insisted that the note of \$332 was void for usury; first, on the ground that the interest included in it had been cast for sixty days, as the *one-sixth of a year*; and, secondly, that it included *one per cent*, the difference of exchange, and that the note in question, having been given for the balance of the note of \$332, was equally tainted with usury. No question was made on the trial but that *one per cent* was the true difference in the rate of exchange between Utica and New York. The defendant requested the circuit judge to charge the jury that the note was void for usury, which he refused to do, and charged that the plaintiff was entitled to recover. The jury found for the plaintiff the full amount of the note, and the defendant moved the Supreme Court for a new trial, which was denied. Savage, Ch. J., delivered the opinion of the court, and said: "There was no excess of interest included in the note of \$332. The interest of \$325.18, for sixty days, and three *days of grace*, which the plaintiff had a right to charge, amounted to \$3.92, making the principal and interest \$329.10, to which add *one per cent*, the rate of exchange agreed on, and the sum of \$332.39 is given, from which deduct twenty-eight cents, the amount paid by Petrie, and the balance is \$332.11, a sum exceeding the amount of the note, which, therefore, was not usurious as including a sum of interest greater than what is allowed by law. Nor was the including the rate of exchange in the note, *per se*, evidence of usury. The payees resided in New York, the maker at Little Falls, and for his accommodation the payees agreed to accept the note payable at Utica, near the residence of the maker. For this accommodation the maker agreed to pay, and such an agreement is valid and upon sufficient consideration. Such an agreement may be a shift to cover usury, but there is nothing to warrant such a conclusion in this case" (*Merritt v. Benton*, 10 *Wend. R.*, 116, 117). It will be observed that two principles are laid down in this case; (1) that casting interest on an amount for sixty days, as one-sixth of a year, or discounting a sixty days' promissory note, is not usury; and (2) the including of a reasonable charge in a note as the difference in the rate of exchange between the place where the payee resides and the place of payment is not, *per se*, evidence of usury. And this case has been uniformly recognized as authority since it was decided.

A very interesting case, involving similar questions, was decided

by the Court of Appeals of the State of New York, within the last few years, and the same may be referred to as a safe criterion by which such transactions may be tested. The action was tried in the Superior Court of the city of Buffalo, and was upon a promissory note for \$2,500, made by one of the defendants and indorsed by the other, at Buffalo, payable in the city of New York in seventy-five days from its date. The note was discounted at the plaintiff's bank in Buffalo for the benefit of the maker, the other defendant having indorsed for his accommodation. The defendants, in their answer, set forth, and they offered to prove, on the trial, that when the note was discounted the exchange between the cities of New York and Buffalo was, and had been for a long time previous, one-half of one per cent in favor of the former place, and that both of the parties expected and believed it would continue so to be until the maturity of the obligation; that both the maker and indorser resided at Buffalo; that they had no funds or business in New York; that they had no expectation of funds there to meet the note when due, except as they should provide the same at Buffalo for the particular purpose of paying the note; that those facts were known to the plaintiff's bank; and, finally, that the transaction was entered into with the design and for the purpose, entertained by both parties, of enabling the bank to realize, in addition to the legal rate of discount, the one-half per cent exchange on the sum of \$2,500. The evidence offered was excluded by the court, and the defendants excepted. The jury found a verdict for the plaintiff, on which the court, at General Term, ordered a judgment for the plaintiff, and it was entered accordingly. The defendants appealed to the Court of Appeals, where the judgment was affirmed. Comstock, J., in his opinion, said: "The exchange between different countries is affected by the comparative weight and purity of the coin in each. It is also liable to sudden and considerable fluctuations in consequence of the revulsions in foreign trade and commerce; and it is more or less influenced by political and other events, which can have little or no effect upon the course of trade and exchange between different points within the sovereignty. The law-merchant, therefore, in adjusting the rights and obligations of parties to foreign bills, takes notice of the prevailing rate of exchange, and allows it to be estimated as a part of the indemnity which is due for the non-performance of the contract. But the same causes do not

operate upon the internal commerce of a State. The standards of currency are the same at all places within its boundaries; intercourse and trade are uninterrupted, and a single jurisprudence pervades every part of it. It is true that slight irregularities in trade will occur, and that a small rate of exchange may arise, in the course of dealing, between different places. But these are facts unacknowledged in the system of commercial law. They suggest no principle, and they have never afforded the foundation for a legal conclusion. In the light of these principles, the question of usury involved in the present case is capable, I think, of a clear and satisfactory determination. The note in controversy was made and indorsed by residents of this State, and was payable within this State. It was strictly an inland or domestic obligation. If the note had been paid at maturity in the city of New York, and the rate of exchange had continued to be one-half of one per cent in favor of that place, the bank at Buffalo, which discounted and still owned it, would have realized an advantage to that extent, because the fund in New York could have been sold at Buffalo, by a draft thereon, at a corresponding premium. Such would have been the practical result, if the maker of the note had paid it at the place specified when it became due. But there is nothing in the law of the contract which secured that result, because the rule of damages, in an action brought upon the dishonor of the note, allows no indemnity for the loss of exchange. * * * A promissory note may be given for money lent, or for goods purchased, payable at a place within the State to which the rate of exchange is favorable. In either case, the construction and effect of the instrument are the same. The measure of damages, and the legal extent of the obligation, are the face of the note and lawful interest. In the one case no question of usury can arise, because there is no loan of money. In the other there is no usury, because, in judgment of law, there is no agreement to pay more than the legal interest. * * * Upon the whole, we are of the opinion that the facts alleged in the answer had no tendency to establish the defense of usury, and, therefore, that the evidence was properly excluded." Allen, J., who also delivered a well-written opinion in the case, said: "The rate of exchange upon inland bills is not fixed by law, as in the case of foreign bills. It depends upon the changes and fluctuations of trade. Though probable, it is not absolutely certain, that the difference in favor of New York

would continue to be, as it then was, at one-half per cent. * * * It is of no consequence to say that making the note payable in New York imposed upon the defendants the additional burden and expense of transmitting funds there to meet the note at maturity. The place of payment is always as much a matter of agreement and regulation between the parties as the time. It is frequently a matter of accommodation to the maker to pay at a distant place. But suppose, in this case, it was not for the accommodation of the defendants, and they did not pay at maturity, what amount could have been reserved, or what amount is actually to be reserved, if the judgment is to be affirmed? Simply the face of the note and interest; and a tender of that sum before suit brought would have extinguished the note. * * * To constitute usury in this case, we are to assume that the rate of discount would be in favor of New York at the time the note became due; which, in our judgment, we cannot do" (*Oliver Lee & Co.'s Bank v. Walbridge*, 19 *N. Y. R.*, 134, 137-139, 142, 144, 146).

In a somewhat earlier case, decided by the same court, a similar question was involved as that in the case of the *Oliver Lee & Co.'s Bank v. Walbridge*, and the result was the same. The action was upon a promissory note, which was given on the settlement and consolidation of several other notes against the defendants, held by the Delaware Bank, in Delhi, which the bank had discounted for the benefit of a firm by the name of Stewart & Frazier, who were doing business in the city of New York. Most of the notes, though not all, were made payable at the American Exchange Bank in the city of New York. The Delaware Bank gave drafts on its correspondents in the city for a portion of the avails of the notes at the time of making the discounts, and charged one-half of one per cent on such drafts, for the difference of exchange in favor of the city. The testimony was conflicting as to whether or not it was made a condition by the Delaware Bank to the discounting of the notes for Stewart that they were to be made payable at a city bank, and that Stewart should receive the avails in drafts of the Delaware Bank on some bank in the city, at one-half of one per cent premium thereon. The defendants insisted that the several notes which formed the consideration of the note in suit, and also that note, were, and each of them was, usurious and void. The court, at the circuit, decided otherwise, and directed a verdict in favor of the plaintiff, to which the defendants excepted. The

judgment was affirmed by the Supreme Court at General Term, and the defendants appealed to the Court of Appeals, by which court the said judgment was also affirmed; the court holding that the transaction was not usurious. Denio, J., in his opinion, said: "At the time the paper in question was discounted by the Delaware Bank, the difference of exchange was against Delaware county. How it would be when the discounted paper should mature, the parties could not certainly know, though, from our knowledge of the course of trade, we may suppose that but little doubt could be entertained upon that point; still, no one could legally know that the funds in New York would then be worth more than at Delhi. Again, suppose the discounted paper had been payable at Delhi; in that case the law would be plain, that the payment of the proceeds in drafts charging the premium would not be usury. * * * These considerations have led me to the conclusion that the transaction was not usurious on account of the payment of this premium of exchange. We do not intend to say what the law would be in a case where the lender should make it a condition of the loan that the borrower should make his paper payable in New York, and should, upon the discount of such paper, insist upon paying the proceeds in drafts, charging a premium of exchange. There is no evidence that such a condition was insisted upon in respect to this paper" (*Marvine v. Hymers*, 12 *N. Y. R.*, 223, 232, 233). All that this case really settles is, that where a country bank discounts a note payable in the city of New York, and, at the request of the person for whose account it was discounted, pays him the proceeds in sight drafts upon its correspondents in New York, charging him therefor the current premium on exchange, the transaction is not usurious. This doctrine had been substantially held by the Supreme Court of the State some years before the case of *Marvine v. Hymers* was decided (*Vide The Cayuga County Bank v. Hunt*, 2 *Hill's R.*, 635; and *vide Portland Bank v. Storer*, 7 *Mass. R.*, 433). And a similar doctrine was reiterated by the New York Court of Appeals at the very next term after the decision of the case of *Oliver Lee & Co.'s Bank v. Walbridge*, in a case wherein it appeared that a bank in Buffalo discounted a note payable in the city of New York, and, in discounting it, sold to the parties getting the note discounted its drafts on New York for the amount, and received a premium thereon of half per cent as exchange. The Superior Court of

Buffalo held that the transaction was not usurious, and gave judgment in favor of the plaintiff for the amount of the note, and the defendants appealed to the Court of Appeals. The latter court declared that the question of usury, as presented by the case, had been disposed of by previous cases decided by the court, and, therefore, affirmed the judgment of the court below; and it was said that the court had had occasion before to consider the point, and had deliberately decided that it is not usury, on discounting commercial paper, to take interest upon the full amount for which it was made, when it has not longer to run to maturity than is usual with paper discounted by bankers; and that the exacting of a premium of exchange on the drafts with which the proceeds of the discounted paper were paid was not usurious (*International Bank v. Bradley*, 19 *N. Y. R.*, 245). And in a later case the same court laid down the general rule that usury cannot be predicated of the advantage obtained by the lender by means of the difference of exchange between the place of the loan and the place of the payment, when both places are within this State. It appeared that the plaintiff required, as a condition of the loan, that the note on which the action was brought should be made payable at Albany, where the maker had not and did not expect to have any funds, instead of Rochester, where he resided, and where the discounting bank was located, the motive for the requirement being to give the bank the difference of exchange, which exchange was then, and generally was, half of one per cent in favor of Albany; but the court held that the case of *Oliver Lee & Co.'s Bank v. Walbridge* (19 *N. Y. R.*, 134), was entirely decisive of the case then before them, and gave judgment accordingly (*Eagle Bank of Rochester v. Rigney*, 33 *N. Y. R.*, 613; and *vide Cuyler v. Sanford*, 13 *Barb. R.*, 339).

To the same import may be cited another late case in the Supreme Court of the State of New York, in which Johnson, J., in giving the opinion of the court, said: "It seems to be well settled by several decisions in the Court of Appeals that the mere fact that a note has been discounted in the country, made payable in the city of New York, and a portion or the whole of the proceeds paid to the borrower in a draft upon the city, at the usual price or charge for city drafts, does not render such note usurious (*Marvine v. Hymers*, 12 *N. Y. R.*, 225; *Oliver Lee & Co.'s Bank v. Walbridge*, 19 *ib.*, 134; *International Bank v. Bradley*,

Ib., 245). Perhaps it might be held to be so, if both the place of payment of the note and the purchase of the draft were made the condition of the loan. But nothing of that kind appears here, even conceding that the note was not in fact discounted until the borrower had received the avails. For aught that appears in the finding of facts, the borrower desired the drafts for his own convenience. If the fact was otherwise, it was for the defendant alleging usury to prove it, and have the fact inserted in the finding of facts" (*Union Bank of Rochester v. Gregory*, 46 Barb. R., 98, 102). And in the old Supreme Court of the State of New York, in an action by a country bank against the indorser of a bill of exchange, mentioning no place of payment, it appeared that the bill was discounted by the plaintiffs for the acceptors; that the drawer, indorser and acceptors resided in New York; that the business was conducted by the plaintiffs through their cashier while in that city; that the avails of the bill were paid in drafts on New York, equal in value to city funds; and that the amount thus paid was the face of the bill, deducting the difference of exchange between country and city funds, in addition to the usual discount; the same doctrine was laid down as in the foregoing cases, and it was held that the bill in suit was not usurious. Cowen, J., in his opinion, says: "Thus the transaction involves, when we come to analyze it, two distinct bargains. It is, in effect, first, a loan by the agent and a delivery to the borrowers of bills upon the agent's own bank, corresponding in nominal amount with that of the proposed loan. Upon this, secondly, the borrowers buy the draft of the bank upon funds more contiguous to themselves, of a less nominal amount, but really equal in value to the bank bills which they have obtained. This would indeed be usurious if the bank made a profit by the transaction beyond the lawful discount. But we know that, in general, country banks dealing in this way do not. In the thing, *per se*, we can discover no profit any more than in a like sale of exchange in London at the usual rate" (*Cayuga County Bank v. Hunt*, 2 Hill's R., 635, 640).

A principle, similar to the one governing the foregoing cases, was laid down by the New York Court of Appeals in a recent case, wherein it was held that a contract or loan was not rendered usurious by a separate and distinct undertaking between the parties that the lender is to receive the deposits of the borrower and to keep them safely, and pay them over on demand on condi-

tion that the notes discounted shall be paid in the city of New York, by means of which an exchange of one-half of one per cent is realized to the lender on the amounts of the paper discounted; and it was declared, that when the relation of the party as a borrower is distinct from his relation as a depositor, the two relations will not be confounded with each other to establish the existence of usury (*Brady v. Benjamin*, 33 N. Y. R., 61; and *vide Utica Insurance Co. v. Cadwell*, 3 Wend. R., 296). And in the State of Wisconsin the Supreme Court has recently held that it is not usurious for a bank to charge the current rate of exchange in addition to the legal interest on making a loan; and a loan made upon such condition was upheld (*Central Bank v. St. John*, 17 Wis. R., 157).

And it may be added, although the statement may be regarded as unnecessary, that the taking of interest in advance, upon the discount of a note in the usual course of business by a banker, is not usury. This has long been settled, and is not now open for controversy. The question came before the Supreme Court of the United States fifty years ago, when the doctrine was plainly established. Mr. Justice Story, in delivering the opinion of the court, said: "The next point arising on the record is, whether the discount taken in this case was usurious. It is not pretended that interest was deducted for a greater length of time than the note had to run, or for more than at the rate of six per cent per annum on the sum due by the note. The sole objection is, the deduction of the interest from the amount of the note at the time it was discounted; and this, it is said, gives the bank at the rate of more than six per cent upon the sum actually carried to the credit of the Planters' Bank. If a transaction of this sort is to be deemed usurious, the same principle must apply with equal force to bank discounts generally, for the practice is believed to be universal; and probably few, if any charters, contain an express provision, authorizing, in terms, the deduction of the interest in advance upon making loans or discounts. It has always been supposed that an authority to discount or make discounts did, from the very force of the terms, necessarily include an authority to take interest in advance. And this is not only the settled opinion among professional and commercial men, but stands approved by the soundest principles of legal construction. Indeed, we do not know in what other sense the word discount is to be inter

puted. Even in England, where no statute authorizes bankers to make discount, it has been solemnly adjudged that the taking of interest in advance by bankers upon loans, in the ordinary course of business, is not usurious" (*Flecknor v. The Bank of the United States*, 8 Wheat. R., 457). The same question came before this same court a few years later and was decided the same way, and the doctrine declared to be settled (*Thornton v. The Bank of Washington*, 3 Peters' R., 36). And the State courts have also held that, to take out interest in advance, or discounting a note without regard to the rules of rebate or discount, is not usurious, and, further, in this respect there is no distinction between bankers and others. That is to say, it is held that discounting a note at the legal rate of interest and taking the interest in advance is not usury, either in bankers or others; and this is now the well recognized rule (*Vide The New York Firemen's Insurance Co. v. Sturges*, 2 Cow. R., 664; *The Utica Insurance Co. v. Bloodgood*, 4 Wend. R., 552; *Bank of Utica v. Wager*, 2 Cow. R., 712; *Hawks v. Weaver*, 46 Barb. R., 164; *Stribbling v. Bank*, 5 Randolph's R., 132; *Maine Bank v. Butts*, 9 Mass. R., 49, 57; *Agricultural Bank v. Bissell*, 12 Pick. R., 586).

CHAPTER XIII.

TRANSACTIONS NOT USURIOUS — BONUS TO AGENTS FOR NEGOTIATING LOAN.

A DEVICE sometimes resorted to by the lender of money to realize more than the legal rate of interest for the use of his money is, to employ an agent to loan his money, with the understanding that he shall charge the borrower a *bonus*, nominally for his own benefit, but *really* to enable him to get a share of the bonus received; and whenever the transaction is, in point of fact, of this character, it is declared to be usurious. But if the agent in good faith make a loan for another, and exacts a *bonus*, besides the legal interest, for his own benefit, without the authority or knowledge of the principal, the loan is not thereby rendered usurious. Many cases are reported in the books in which this doctrine is recognized, both in this country and in England, some of which will be referred to.

In an early case in the English King's Bench, the question was clearly presented and decided. The action was brought by the indorsee of a bill of exchange against the acceptors, and the defense set up at the trial before Lord Ellenborough, C. J., at Guildhall, was, that the bill was drawn for a usurious consideration, and was therefore void. It appeared that the defendants, wanting to raise money, applied to one Rimmer, a broker, to assist them in negotiating their paper, for which he stipulated to receive ten shillings, instead of the usual charge of five shillings per cent for brokerage; and several successive bill transactions had passed between them, which the defendants who accepted these bills had provided for, as each had become due, by negotiating another for the amount of the former bill, with the addition of the legal discount and the brokerage agreed on, which latter Rimmer received and deducted out of the money raised on each successive bill. Lord Ellenborough, C. J., directed the jury that there was no actual loan of money here for a usurious consideration, by the party advancing the money on the bill; and that the taking of exorbitant brokerage by Rimmer for getting the bill discounted by others, and which was deducted by him out of the money raised, would not avoid the security (by the statute 12 *Anne*, *ch.* 16) in the hand of an innocent indorsee; and the jury thereupon found a verdict for the plaintiff. The attorney-general moved for a new trial, on the ground that the words of the statute were broad enough, in that branch of it which avoids the security, to include this transaction; but the rule was refused. Lord Ellenborough, C. J., in his opinion, said: "It does not appear that Rimmer's name was upon the bill at all; nor was he to advance the money. It does not, therefore, strike me as a security given for a usurious consideration; but Rimmer was to receive an exorbitant brokerage for his trouble in getting the bill discounted." Le Blanc, J., said: "If Rimmer had agreed to advance the money for which the bill was given, that would have been a different matter, but here he advanced nothing; and the person who did advance the money for the bill received no more than legal interest for discount. Rimmer, indeed, got more out of the money when obtained; but that may be said to be for exorbitant commission or brokerage" (*Dagnell v. Wigley*, 11 *East's R.*, 43).

In a later case, before the same court, where a broker carried bills to be discounted, and allowed to the person discounting

interest at the rate of £5 per cent per annum, and in addition, £1 per cent on the amount of the bills toward the payment of a debt due from a third person, but which the broker thought himself bound in honor to pay, and the broker accounted to his principals for the whole amount of the bills, services, lawful discount and commission; the court held that the transaction was not usurious. Lord Tenterdon, C. J., gave the opinion of the court and said: "The question in this case was, whether the bills on which the plaintiffs had commenced their action against the defendants as acceptors were tainted with usury. They had been discounted through the intervention of a broker of the name of Bramley, who before the discounting of the bills had represented to Alzedo, the bankrupt, by whom they were discounted, that in consequence of his having recommended to the bankrupt, one Wagstaffe, for whom Alzedo had discounted bills, but who failed, so that Alzedo had incurred great loss, he, Bramley, felt himself under an honorary, though not under a legal obligation to make good that loss. The mode which he proposed in order to affect this object was, that as he could not pay the whole at once (for he otherwise would have done so), he (Alzedo) should go on discounting for him, and should deduct from the sums to be paid to him (Bramley) on such discount £1 per cent; but, nevertheless, Bramley was not to deduct that £1 per cent from the persons who employed him, but to account to them for the full amount, deducting only ordinary interest. I left to the jury the question, whether they were of opinion that Bramley thought himself under an honorary obligation, intimating to them as my opinion, that in case they thought Bramley acted under an idea, honestly formed in his own mind, that he was under an honorary obligation to pay the money, I was inclined to think that, in point of law, it was not a usurious contract. I still incline to think that if Bramley did feel himself under an honorary obligation, the contract was not usurious; and I believe some of my learned brothers are of the same opinion, though one of them differs from me. We are all, however, agreed that, notwithstanding I did intimate to the jury my opinion upon the subject, yet as I left it to them to exercise their own discretion, and to show their own conclusion from the evidence, we ought not to disturb their verdict, and that more especially as this is a case in which, if the usury be established, the penal con-

sequences are heavy. The rule for a new trial must, therefore, be discharged" (*Salarte v. Melville*, 7 *Barn. & Cres. R.*, 427; *S. C.*, 14 *Eng. C. L. R.*, 73). And of a similar import was a decision of the English Court of Chancery. An agent, authorized to settle a debt due the estate, took a note to the administrator for the principal sum due, and one to himself for usurious interest. The court held the first note was not void, unless the administrator knew of the usury and assented to it (*Baxter v. Buck*, 10 *Ves. R.*, 548).

The American cases are quite as, if not even more, decisive upon the point. In an early case before the old Supreme Court of the State of New York, the court adopted the doctrine of the English cases on the subject. The case came up on error from the Common Pleas of New York. The action below was assumpsit by plaintiffs as indorsees against one Coster, payee and indorser of a promissory note made by one Murgatroyd for \$240, dated October 22d, 1825. The defense was usury; and it appeared on the trial that the note was a renewal of one made for the accommodation of Murgatroyd, to secure the money which one Johnson, at the request of Murgatroyd, procured of one Wendell at lawful interest; but Murgatroyd agreed to pay Johnson three per cent a month, which had been done, and he put the three per cent into his own pocket. The question of fact at the trial was whether Johnson was employed by Murgatroyd as his agent, or was a principal procuring the money on his own account and lending it to Murgatroyd. The jury rendered a verdict for the plaintiffs, and the defendant brought error on exceptions to the charge of the court referring the question to the jury. Curia, per Savage, Ch. J.: "The proper question was put to the jury, whose verdict cannot be reviewed here as to the weight of evidence. They have negatived the fact sent up by the defendant below, that Johnson was a principal, which leaves the case much like that of *Dagnell v. Wigley* (11 *East.*, 43). In that case, a bill of exchange, procured like the note now in question, was held not to be usurious, upon the ground that the person advancing the money received no more than legal interest; the person receiving more, a broker, being the drawer's own agent. Judgment affirmed" (*Coster v. Dilworth*, 8 *Cow. R.*, 299, 301). And in a later case, before the same court, it was held that a note reserving interest, negotiated by a broker or agent, who obtains the money on the same for the maker from a

third person, is not usurious in the hands of the holder, although the agent be the payee of the note and receives twelve and a half per cent for the negotiation, no part of such sum being paid or agreed to be paid to the person advancing the money. Savage, C. J., gave the opinion of the court and said: "By the testimony of Corp it appears that he was the mere agent or broker of the defendant; that he was not, in fact, a party to the loan, and that what is complained of as usury was a gratuity. There was no corrupt agreement between the plaintiff and the defendant. In the language of Le Blanc, in *Dagnall v. Wigley* (11 East., 45), if Corp had agreed to advance the money, that would have been a different matter. But he has advanced nothing, and the person who did advance the money received no more than legal interest. Corp swears that the notes on which the money was received were discounted on the responsibility of the indorsers, and that he acted throughout as the agent for the defendant." The case showed that the question was submitted to the jury at the circuit, and the judge charged the jury that the verdict should be for the plaintiff if they believed the testimony of Corp. The jury found for the plaintiff, and a motion was made to set aside the verdict, which the court denied (*Barretto v. Snowden*, 5 Wend. R., 181, 186, 187). In all of these cases the person taking the bonus for making the loan was held to be the agent of the borrower, and it did not appear that the lender was privy to the arrangement between the borrower and his agent, under which the amount was received.

The next case in the State of New York involving the question, which it is important to notice, was originally decided by the present Supreme Court of the State, wherein it was held that an agreement, made by a borrower with the agent of the lender, that the agent shall have a commission for making the loan, does not render the transaction usurious and the security void if made without the knowledge of the lender, and it is in no respect for his benefit or advantage. It was declared that in such a case the agreement will be held to be that of the agent of the borrower only, or the private extortion of the agent, and that he alone is answerable for the wrong. The loan was negotiated by the agent of the borrower with the agent of the lender. The amount of the loan was \$400, and for the service the borrower paid his own agent \$15, and the agent of the lender \$25, and

no charge was made by the lender's agent to his principal for negotiating the loan. The action was originally tried at Special Term, where judgment was given for the defendants on the ground of usury, and the plaintiff appealed to the General Term, at which a new trial was granted. Johnson, J., who delivered the opinion of the court, said: "Upon the facts found by the judge at Special Term, was this transaction usurious, *per se*? It was held to be so by the learned justice before whom the cause was tried, although the fact is distinctly found that the plaintiff had no knowledge of the charge of twenty-five dollars by his agent, and never received any portion of it. As the plaintiff never knew of the charge, and it was not made for his benefit but for the exclusive benefit of his agent, he cannot be held to have sanctioned it by bringing the action to collect the note. The decision at Special Term goes further, I think, than any court has yet gone in this direction. At least, I have been able to find no reported case which goes this length, and upon principle I do not see how it can be sustained. * * * An agreement between the lender and his agent, that the latter may exact a commission from borrowers may, I have no doubt, be proved, and where the fact is established the inference may be drawn that the lender authorized or sanctioned the exaction in any given case; and, perhaps, this agreement may be inferred from the course of dealing between the principal and agent. * * * I have no doubt that the agent of the lender, whether the principal agree to it or not, may lawfully take compensation of the borrower for any services actually rendered for the latter at his request. If the amount exacted is far beyond a fair compensation for other services, and it is shown to have been within the knowledge of the lender and part of the agreement to make the loan, a question of fact would arise for the jury whether the compensation exacted was not a mere cover for usury. Usury is a question of fact and of intent. In the present case there can be no pretense that the agent rendered any services to the borrower, or was acting in any sense as the borrower's agent. * * * All the plaintiff's agent did was to receive the note and give his check for the \$400, the amount of the note. It will be seen, therefore, that he acted wholly for the plaintiff. The borrower drew the money and paid the twenty-five dollars afterward to the plaintiff's agent, in pursuance of the agreement between them. And the case turns wholly upon the

question whether this part of the agreement, for the commission or compensation to the agent, was the agreement of the plaintiff. It seems clear to my mind that, inasmuch as the plaintiff never authorized or sanctioned it, nor even heard of it, and derived no benefit or advantage whatever from it, it cannot be regarded as his agreement. Courts ought and will look with jealous scrutiny upon all such practices by the agents of lenders, and see that the statute is not violated and its provisions evaded under the cover of an agency. But they should be equally careful to protect the honest and innocent lender from the secret and exorbitant exactions of grasping agents, and the secret and unauthorized agreements between such agent and the borrower. My conclusions are that the note is a valid note and never imbibed any taint of usury, and that the action is well brought. The judgment of the Special Term must, therefore, be reversed and a new trial ordered, with costs to abide the event." Wells, J., dissented, but Selden, J., concurred, and a new trial was denied (*Condit v. Baldwin*, 21 Barb. R., 181, 190). The ground was taken by the defendants' counsel in this case that the act of the agent was the act of the principal, and, hence, that the contract of the agent of the lender to make the loan was binding upon his principal, the plaintiff, and that it was his contract. The counsel cited works and authorities on agency to prove his position; but the court held that inasmuch as the agent of the borrower and the agent of the lender had made the agreement in respect to the commission, without the lender's knowledge, and in no respect for his benefit or advantage, it must be considered the agreement of the agent and the borrower only, or the private extortion of the agent, and that he alone, if any one, should be held responsible for the wrong. It was also contended that although the act of the agent in taking the bonus was not authorized by the principal, that is, the lender, yet that she had ratified the illegal act by receiving the security and bringing her action upon it, thus claiming all the benefits resulting from the transaction; but the court do not seem to have considered it necessary to take into account that view of the case. An appeal was taken from the judgment to the Court of Appeals, and the judgment of the Supreme Court was affirmed; the Court of Appeals laying down the rule that, where an agent, intrusted with money to invest at legal interest, exacts a bonus for himself as the condition of making

a loan, without the knowledge or authority of his principal, the act of the agent does not constitute usury in the principal, nor affect the security in his hands. Davies, J., in the prevailing opinion of the court, said: "In the present case it is not alleged or pretended that the plaintiff has personally taken or received any illegal interest on the loan made to the defendants, or that she had any knowledge, until the trial of this cause, of the secret arrangement made by Mills, the agent of Baldwin, the borrower, with Williams, her attorney and agent, whereby the latter received a *douceur* for his private and exclusive benefit. The plaintiff, a non-resident of the State, sends her money here to invest, according to the laws of this State. All the authority given to Williams, as her agent and attorney, to transact the business of his principal, must, in the absence of any counter proof, be construed to transact it according to the laws of the place where it was to be exercised. The law will never presume that parties intend to violate its precepts. * * * The rule that when an agent commits a wrong in the transaction of the business of his principal, the principal is liable for the injury produced by such wrong, has no application to the present case. The rule cannot apply where the agent, when committing the wrong, is bargaining on his own account, for his own private advantage exclusively, and this is known to the person with whom he is bargaining. It could only apply where the person dealt with is deceived or wronged, which in no sense is the present case. * * * But it is urged with great earnestness and ability that the plaintiff, by accepting the note and commencing this suit upon it, has ratified all the acts of her agent connected with the loan and attendant upon its inception. We have carefully looked at all the authorities cited by the learned counsel for the defendants, and we think they fail to sustain the proposition contended for. The plaintiff, by receiving and accepting the note for the amount of her money, and which she loaned through her agent, only ratified the contract of loan at the rate of interest expressed in the note. She had no knowledge of, and cannot be held to have ratified, the payment by Baldwin's agent to Williams of the twenty-five dollars usuriously by him taken, as is said. We think the cases fully sustain this view of the plaintiff's act, in receiving the note and commencing suit thereon." Comstock, Ch. J., dissented, and in a very able opinion contended that the loan was made in pursuance of a single contract, and that this contract embraced the whole transaction; that there

was but one original agreement, which included the whole subject; and this being the case, it was insisted that more than lawful interest was included in the loan. The chief judge further contended that the plaintiff could not be permitted to divide the contract into two parts, and adopt one part, while she rejected the other. This position was predicated upon the well-known elementary principle recognized by the authorities and laid down by Mr. Justice Story, that "the principal cannot, of his own mere authority, ratify a transaction in part and repudiate it as to the rest. He must either adopt the whole or none. And hence the general rule is declared that when a ratification is established as to a part, it operates as a confirmation of the whole of that particular transaction of the agent" (*Story on Agency*, § 250). Applied to the case in hand, the result of this rule was thought to be that the plaintiff, if she insisted upon the contract at all, must take it "with all its vices and infirmities." Denio and Welles, JJ., concurred in the opinion of Chief Judge Comstock, while Selden, Clerke, Wright and Bacon, JJ., concurred in the opinion of Judge Davies; and the judgment of the Supreme Court was therefore affirmed (*Condit v. Baldwin*, 21 N. Y. R., 219, 221, 223, 225, 229, 231).

Soon after the decision of *Condit v. Baldwin* by the Court of Appeals, a case came before the Supreme Court, in which it appeared that a broker loaned \$2,000 belonging to his principal for thirty days, charging the borrower thereof a commission of seventy-five dollars, which was paid. A note was given for the \$2,000 loaned, and when it became due another arrangement was made with the broker, under which the loan was continued for the space of thirty days longer and the broker received another extra sum of eighty dollars, and a new note was given to the broker to secure the original loan of \$2,000. This last note not being paid, the lender brought suit, and the defense of usury was interposed. The case was properly submitted to a jury at the circuit, and a verdict was found for the defendants. The plaintiff thereupon appealed to the General Term, where the verdict was set aside as being against evidence, and a new trial ordered. Ingraham, J., in delivering the opinion of the court, said: "The defense set up by the defendants in this case to the note on which the action was brought was usury. That usury was alleged to be the payment of more than seven per cent to one Hardenburgh for originally obtaining the loan, and at subsequent times for renewal of it. Whether such payment was usurious or

not depended on the character in which Hardenburgh was acting. If the original loan was for money, then the taking of more than seven per cent interest would affect the security with usury, and make it void in the hands of any subsequent successive holders. But if he was acting as a broker, and this commission was charged by himself, without the knowledge or participation of the lender, then it would not be a usurious transaction. This has been held by the Court of Appeals in *Condit v. Baldwin*, at a recent term. The testimony of Hardenburgh is positive on this point; and if it is to be credited, then it is very clear that he was only an agent, and what he received in no way passed to the lender, Hayward, nor was it to be considered as constituting usurious interest. On the contrary, it was merely a commission to the broker for his services, paid without the knowledge of the lender, and paid with the knowledge that Hayward was to loan the money, and not Hardenburgh" (*North v. Sergeant*, 33 *Barb. R.*, 350, 352, 353; and *vide Fellows v. Commissioners, etc., of Oneida*, 36 *ib.*, 655).

The case of *Condit v. Baldwin* has been fully recognized as authority by the New York Court of Appeals in a subsequent case, although an effort was made to induce the court to reverse its decision in the former case. The action was brought by a Mrs. Earle, the payee of a promissory note given upon the loan of her money by her agent, one Glover. The defense was usury, and it appeared on the trial that application was made to the plaintiff's agent, on behalf of the defendant, to borrow Mrs. Earle's money on a note bearing interest, and it was agreed in substance between Glover and the party acting for the defendant that, as a condition of making the loan on the note, the defendant should pay Glover fifty dollars. Accordingly, Glover went to Mrs. Earle's rooms, and there received from her \$1,000 in gold, and brought it to the defendant and handed the same to him. The defendant and others counted the money, and afterward separated fifty dollars from the packages, and handed it to one Vedder. The note was delivered to Glover, and by him taken to Mrs. Earle. Vedder subsequently handed the fifty dollars to Glover. Mrs. Earle testified that she knew nothing of the arrangement by which the fifty dollars were to be paid, or that such sum was paid to any one, and that she never heard of the fifty dollars transaction until after the suit was brought. The judge at the circuit charged the jury, among other things, that if they found that Glover was the general agent of the plain-

tiff, and claimed and took the fifty dollars for the plaintiff as her agent, and for the purpose of obtaining more interest than at and after the rate of seven per cent, although the plaintiff was ignorant of the fact, and did not specially authorize it, yet she was barred by the acts of Glover, as her agent, and the defendants were in that case entitled to a verdict. To this part of the charge the plaintiff excepted. The court further charged that the principal is bound by the acts of the agent in the loaning of money at a usurious rate of interest, although the same be done without the knowledge or consent of the principal. To this the plaintiff also excepted. The plaintiff's counsel asked the court to charge that if Glover took or received the fifty dollars without the knowledge or consent of the plaintiff, it was not usury, and the plaintiff would be entitled to recover on the note in suit; but the court declined so to charge, to which the plaintiff's counsel excepted. The counsel for the plaintiff further requested the court to charge that, under the evidence, the plaintiff was entitled to a verdict; the court refused thus to charge, and the plaintiff's counsel excepted. The jury found a verdict for the defendants. A motion was thereupon made on the judge's minutes at the same circuit for a new trial, and the court granted the motion. On an appeal, founded on case and exceptions, from the order granting the new trial, the order was reversed by the General Term; whereupon the plaintiff appealed from the judgment entered on the verdict, on the same case and exceptions, and the judgment was affirmed, and the plaintiff then appealed to the Court of Appeals, where the judgment was reversed and a new trial granted. It appears, however, from a note by the reporter, that a majority of the court were against reversal, if the principal point had been open to consideration as an original question, and two members of the court yielded to the authority of the decision in *Condit v. Baldwin* only on the principle of *stare decisis*. Only two opinions were delivered in the case, and both of them were by judges who dissented from the judgment. Davis, J., in his opinion, said: "The court below, in reversing the order for a new trial made by the judge at circuit, distinguished this case from *Condit v. Baldwin* (21 N. Y. R., 219), and held that neither the charge as given, nor the request to charge, raised the point involved in that case. The conviction of the learned justice by whom the opinion of the court below was pronounced, that 'the doctrine of *Condit v. Baldwin* is somewhat novel and difficult to sustain, and

for that reason should not be applied to cases not clearly falling within it,' led him, it is apprehended, to seek for a distinction where no real difference exists. * * * A careful examination of this question brings me to the conviction that, so far as relates to the question presented by the request to charge, this case is not justly distinguishable from *Condit v. Baldwin*; and, if that case be conclusive evidence of the law, the judgment in this should be reversed and a new trial granted. But I am not without hope that this court is prepared to revoke its decision in *Condit v. Baldwin*. The error of that case has not become so inveterate that to adhere to it is better than to return to sound principles. The circumstances of the times, since its promulgation, owing to the inflation and character of the currency, have been such, that the usurer's 'occupation's gone.' It has wrought, therefore, little if any of the evil that ordinarily would attend a practical amendment of the statute against usury. To retract the decision now, will be in time to guard to some extent against the ills of a future revulsion, in which avarice may prey upon necessity through the wide breach that case has opened in the law of usury. After the clear and forcible dissenting opinion of Comstock, Ch. J., in *Condit v. Baldwin*, it borders on arrogance in me to assume to discuss the question. The few suggestions made can hardly escape the censure of being unnecessary repetitions. * * * A vital error of *Condit v. Baldwin* lies in assuming that the agent can make this contract so that the bonus will belong to him, and not inure to the benefit of his principal. But that is an impossibility both at law and in equity. To hold the contrary, is to assert that an agent, by violating his duty, can secure gains to himself greater than its performance could give him. It is a principle too well settled to be shaken, that an agent cannot so deal with the subject-matter of his agency, whether within or without the scope of his authority, that the profit therefrom shall inure to himself. * * * To hold that a party employed to loan money for another may make it the condition of a loan that the borrower shall pay to him a sum of money in which his employer shall have no interest, is to subvert the fundamental principles upon which the doctrines of principal and agent, trustee and *cestui que trust*, rest. It would even overthrow all agencies, if the courts were to settle that an agent could, by departing from his authority, stipulate for and hold advantages for himself. The personal gain of

the agent would become the primary motive of his conduct, and thus thwart the policy of the law, which has ever been to preserve his truth and faith toward his employer by denying him all possibility of advantage, by fraud or treachery or departure from the plain line of his duty. * * * But it is argued there can be no violation of the statute against usury without an intent to violate it; and that the intent in this case pertains solely to the agent, and in no sense affects the principal, because of her total ignorance of the illegal conditions of the contract. This position is undoubtedly sound, so far as the question of intent affects the plaintiff *criminaliter*. She could not be prosecuted criminally until she had knowingly ratified the transaction by receiving the stipulated usurious provisions. Until then the crime is the agent's alone. But in considering this question of intent we must not confound the personal intent, which is the essential ingredient of crime, with the legal intent which the law deduces from the acts of the parties independently of any guilty motive on their part. * * * The agent who effected the loan cannot be chargeable with usury unless he made a usurious loan; and if he made such a one, then the evidences of it are void by statute, into whose hands soever they may come. It may be said the principal makes the loan, and the agent takes the usury; but the usurious premium is the consideration of the making of the loan, no matter who makes it; and as that fact cannot be expurgated by any argument, the taint of usury affects the loan, or there is no usury. It would have been better to have boldly said the transaction is not within the statute of usury at all, but mere extortion, than to uphold the loan as not void for usury, and condemn the bonus as evidence of crime under the statute against the agent. * * * If her agent had exceeded his authority in making the contract, the law gave her an election of remedies: to repudiate the contract and pursue her money into the hands of the party who had received it; to prosecute her agent for a violation of duty, and recover such damages as she had sustained by his misconduct; or to insist upon the contract he had made, taking it as in fact made, and of course, in that proceeding, estopping herself from raising the question of his authority. Until *Condit v. Baldwin*, I think there was no case, entitled to be regarded as authoritative, that held she had any further rights." Brown, J., in his opinion, said: "I find myself unable to extract any general principle from the case of *Condit v.*

Baldwin (21 N. Y., 219), which will aid us in applying the statute of usury to contracts for the loan of money. We cannot with safety accept it as an adjudication, that usurious contracts made by an agent for his principal, and without special authority in regard to the rate of interest, are free from the consequences denounced by the statute, and may be enforced in the courts at the suit of the principal. The consequences of such a rule would be to deprive the statute of any real vitality and living power, and reduce it to a mere *brutum fulmen*. There are no legal analogies to sustain it, for where the contract sought to be enforced is that made by the agent, it is neither good nor bad, legal nor illegal. If the agent had power to make it, and it transgresses no rule of law, it is legal, and may be enforced; but if he had no power from his principal to make such a contract, and especially if it be tainted with an element forbidden by law, the principal is not bound to accept it, and it cannot be enforced as an obligation against him, if in terms it creates an obligation, nor can he be affected or prejudiced by the consequences resulting therefrom. This is the most that can be said. He may repudiate and reject it as soon as its illegality comes to his knowledge; he may treat it as a nullity, and occupy the same position he would have been in had it never been made, and seek his remedy, for what he has lost or been deprived of, in some other form or against some other person. He cannot, however, accept a part of it and reject another part. It is entire and incapable of separation. * * * No one would doubt, I think, that if the agent himself was the party to the contract, in the place of the principal, that it would plainly be usurious. It does not cease to be so because the principal is the party and not the agent. It remains the same identical contract in all its essential particulars, and usury is of its essence whichever may be the contracting party."

It appears from the report of the case that all the judges, except Brown, J., concurred in the opinion that it was not distinguishable from *Condit v. Baldwin*; and that the judge at the circuit erred in not charging the jury as requested. Denio, Ch. J., and Porter, J., expressed their concurrence in the views of Davis, J., but acquiesced in a reversal on the authority of *Condit v. Baldwin*, on the principle of *stare decisis*. Porter, J., concurred with Davis, J., both in his views and conclusions (*Bell v. Day* 32 N. Y. R., 165, 168, 170-174, 178, 179, 182-185; and *vide Elmer v.*

Oakley, 3 *Lans. R.*, 416). The questions discussed in the cases of *Condit v. Baldwin* and *Bell v. Day* are exceedingly interesting and important, and enough has been extracted from the opinions delivered, both prevailing and dissenting, to present fairly the views of the members of the court. Of course, the questions decided may be regarded as settled in the State of New York; but from the strength of the dissenting members, and the able and well fortified opinions delivered in opposition to the conclusions arrived at in the cases, it is doubtful whether they will be readily acquiesced in by the courts of other States.

Something akin to the doctrine of the last cases considered was enunciated in an early case in the State of Vermont. An agent who was authorized to settle a debt due to an estate took a note from the debtor to the administrator for the sum due, and another for a further sum to himself payable at a future day. The former note not being paid when due, the administratrix sued it, and the maker set up usury, but the court overruled the defense. The court said: "Inasmuch as there was a *bona fide* indebtedness to the estate of which plaintiff was administratrix, and the note received by plaintiff was only for the just amount due, the note in suit would not be void if Petrus Baxter (the agent), without her consent, received a note for himself for any further sum" (*Baxter v. Buck*, 10 *Vt. R.*, 548). The principle of this case would seem to uphold the validity of a note to the principal, given under the same circumstances as in the cases of *Condit v. Baldwin* and *Bell v. Day*; and although the case has never been directly overruled, yet in a much later case before the same court the same principle was involved, and the transaction was held to be usurious (*Vide Austin v. Herrington*, 28 *Vt. R.*, 130). Nevertheless, the doctrine is well settled, and universally recognized, that an agent may lawfully take a reasonable commission or bonus from the borrower for his expenses and services in effecting a loan; and whenever the lender is not privy to the arrangement between the borrower and agent, or in no way participates in the commission or bonus, the transaction will be regarded as free from the taint of usury.

The Court of Errors and Appeals of the State of New Jersey have recently laid down the rule, in accordance with that recognized in the State of New York and elsewhere, that if an agent, in making a loan of money, accepts from the borrower a bonus

beyond the legal rate of interest, such act of the agent will not render the contract usurious, if the bonus was taken without the knowledge of the principal, and was not received by him.

An action was brought in the Court of Chancery for the foreclosure and sale of certain mortgaged premises to pay the balance claimed to be due on a bond and mortgage. The defendant set up as a defense that the transaction was usurious. It appeared that the bond and mortgage were given for a loan of \$5,000, made by the agent of the lender, and it was claimed that the loan was made by the said agent on condition that the lender should pay him a bonus of \$100, which was paid at or about the time of the delivery of the bond and mortgage. The chancellor overruled the defense and ordered a decree in favor of the appellant, and the defendant appealed to the Court of Errors and Appeals, where the decree of the chancellor was unanimously affirmed. Elmer, J., delivered the opinion of the court, and said: "We are not satisfied that the first ground of usury thus set up is proved to be true. The defendant himself swears to the facts; but although the statute has made him a competent witness, his credibility is open to question, and we do not feel justified in deciding that a debt, secured by a bond and mortgage, shall be discharged by the uncorroborated oath of the party who has made and is bound by them. In this case, it appears that he has paid the interest for many years, and a part of the principal, and made no complaint of usury during the lifetime of Mott, who alone could contradict him. But if he did pay a *bonus* of \$100 to Mott to obtain this loan, as he alleges, there is not only no evidence that he had any authority from the institution to receive it, or that the other members of the funding committee, by whose concurrence the loan was made, had any knowledge of the transaction, but it is found that they were ignorant of it, and that no part of the money went into the funds of the complainants. This ground of usury, therefore, entirely fails" (*Muir v. The Newark Savings Institution*, 16 *N. J. Eq. R.*, 537-539).

And in another case, in the same State, it was held that the payment of illegal brokerage to an agent for effecting a loan, where no part of it is received by the lender, cannot taint the loan with usury (*Conover v. Van Mater*, 3 *Green's R.*, 481).

In the State of Connecticut it has been held that a loan, which, if made by the principal, would be usurious, is not so if made by

an agent, and the excess of interest is paid, or stipulated to be paid, to the agent, for the use and benefit of the agent only, without prior authority from the principal, or subsequent ratification by him; and it was further held, that authority to make a usurious loan will not be presumed when the agency is special and limited to a single transaction. It was said, however, that it may be presumed when the agency is general, and embraces the business of making, managing and collecting the loans of a moneyed man. But, it was added, it is presumption of fact, and may be rebutted (*Rogers v. Buckingham*, 33 Conn. R., 81).

And in the State of Virginia it was decided that when it was agreed between a debtor and creditor that, besides paying the principal and interest of the debt out of certain securities placed in the hands of the creditor's counsel, who was to collect and appropriate them to the debt, the debtor should pay the counsel two and a half per cent commission on the debt, this was a reasonable compensation for that service, and that the transaction did not constitute usury (*Hopkins v. Baker*, 2 P. & H. R., 110).

The general doctrine, then, is, that a bonus paid to an agent by the borrower, as a compensation for procuring a loan, when the same is not resorted to for the purpose of enabling the lender to procure more than the legal rate of interest for the use of his money, does not render the loan usurious; and the cases referred to in this chapter may be regarded as the leading ones illustrative of the subject, wherein the transactions have been upheld by the courts.

CHAPTER XIV.

TRANSACTIONS NOT USURIOUS—CASES IN WHICH THE MONEY LOANED IS NOT AGREED TO BE RETURNED AT ALL EVENTS—BOTTOMRY CONTRACTS—CONTRACTS IN THE FORM OF A POST OBIT—TRANSACTIONS BETWEEN PARTNERS.

It has been shown in a previous chapter that, in order to constitute usury, there must be a contract for the return of the money loaned *at all events*; for, if the return of the principal, with interest, or of the principal only, depend upon a contingency, there can be no usury. This is obvious; because that which may never be received cannot be said to be forborne for any given time.

But if the contingency extend only to the interest, and the principal be beyond the reach of hazard, the lender or forbearer can, in such case, lay no claim to interest above the legal rate, without being guilty of usury. It has been shown, however, that a distinction is to be observed between a contingency merely affecting the interest and an option which the debtor has of defeating the payment of any interest by a performance of some act stipulated for at the creation of the contract; for, when such an option is given, and the debtor either neglects or refuses to avail himself of such condition, the law insists upon his paying such additional interest as a penalty for his neglect or refusal. Cases in which the courts have sanctioned the agreement to pay a premium greater than the legal rate of interest, in consideration of the hazard which affects the principal, are quite numerous; but the doctrine is best illustrated where money has been advanced by way of insurance, bottomry, *post obit*, and annuity. In all these cases, however, it must be clearly seen that no usurious transaction is concealed beneath such as are thus favored by the law. For then no form will protect the contract; the substance must be taken into consideration; and any usurious intention will vitiate an insurance, or an annuity, as much as if there had been no such disguise assumed by the contract. But to the examination of cases which have been held to be free from the taint of usury, because the return of the money loaned has depended upon a contingency, or the principal has been subjected to hazard:

One of the earliest English cases reported, illustrating the doctrine that usury cannot exist where, by the terms of the agreement, the principal and interest are *bona fide* put in jeopardy, was this: A ship went to fish in Newfoundland (which voyage might be performed in eight months), and the plaintiff delivered £50 to the defendant, to pay £60 upon the return of the ship off Dartmouth; and if the said ship, by occasion of leakage or tempest, should not return from Newfoundland to Dartmouth, then the defendant should pay the principal money, viz., £50 only; and, if the ship never returned, he should pay nothing. Upon an objection to the legality of this contract, it was held unanimously by the court not to be usury within the statute; for, if the ship staid at Newfoundland two or three years, the defendant should have paid at the return of the ship but £60; and if the ship never returned, then nothing; so that the plaintiff ran a hazard of having less than the

interest which the law allows, and possibly neither principal nor interest would be returned (*Sharpley v. Hunt*, *Cro. Jac.*, 208).

Another early case was where an obligation was made, conditioned that if a ship sent to sea, or the goods therein, or the obligor, should return safe, to pay him the sum, beyond the rate allowed by the statute, for the loan of £100, and also the £100. It was objected that this was a usurious contract, because payment depended upon so many things, one of which, in all probability, must happen; though if it had depended on the return of the ship only, it might be good. But it was resolved by the whole court that it was a good bill of bottomry, and tolerable by the usage among merchants, and allowable by reason of the great perils of the sea (*Sawyer v. Ghan*, 1 *Lev. R.*, 54; *S. C.*, 1 *Sid. R.*, 27).

And another early English case was where a bond was conditioned to pay so much money, if such a ship returned within six months from Ostend to London, which was more by the third part than the legal interest of the money; and, if she did not return, then the obligation to be void. It was alleged and contended that this was usury. But Hale, Chief Baron, said: "Clearly this bond is not within the statute, for this is the common way of insurance; and, if this were void by the statute of usury, trade would be destroyed. It is uncertain and a casualty whether such a ship shall ever return or not (*Joy v. Kent*, *Hardr. R.*, 418).

And still another early English case was where an obligation was entered into to pay the plaintiff £100 on the marriage of the daughter of one of the parties; and if either the plaintiff or defendant should die before such marriage, nothing was to be paid. On action brought upon the bond, the defendant interposed the defense of usury, and that this was for the loan of £30 before delivered. The plaintiff demurred to the plea of the defendant, and the court sustained the demurer, holding that it was plain bottomry (*Long v. Wharton*, 3 *Keb. R.*, 307; and *vide Grigg v. Stoker*, *Forrest's R.*, 4).

And in a comparatively late case in the English King's Bench, in debt on a bond, purporting to be a loan on *respondentia* on an East India ship, to which two sets of special pleas were pleaded, one set alleging usury and the other illegality, under the statute (19 *Geo. II*, *ch.* 37, § 5), it was left to the jury to say whether it

was a *bona fide* transaction on *respondentia*, or a loan on usury; the jury found in favor of the plaintiff, and the defendant moved for a new trial, but the motion was denied. Lord Tenterden, C. J., in his summing up to the jury, on the trial before him, said: "This is an action on a bond purporting to be on *respondentia*. The question is whether it was really a loan at *respondentia*, or was merely a loan to which the form of a *respondentia* was given, as a color to enable the plaintiff to get more than legal interest. On the face of the instrument it purports to be on *respondentia*. If the ship had been lost, the money would have been lost too. It is of no consequence to the plaintiff whether Wilkinson allowed Crosthwaite to have the money afterward or not. If you think it was *bona fide* a transaction on *respondentia*, then you will find your verdict for the plaintiff; if on the contrary, then you will find for the defendant." The court, *in banco*, expressed the opinion that, in effect, the direction of the jury was sufficient, and, therefore, refused to grant the rule for a new trial (*Wynne v. Crosthwaite*, 4 Carr. & P. R., 178; S. C., 19 Eng. C. L. R., 329, 336).

These were all held to be cases of bottomry and *respondentia*, and, therefore, clear of the taint of usury. In our own country the law is equally decided that bottomry and *respondentia* bonds and contracts are not within the statutes against usury; and sometimes, as in the State of New York, the rule is incorporated into the law itself; that is to say, such transactions are expressly excepted out of the operation of the statute.

It may not be inappropriate here to state that the general nature of a *respondentia* bond is this: The borrower binds himself in a large penal sum, upon condition that the obligation shall be void if he pay the lender the sum borrowed, and so much a month from the date of the bond till the ship arrives at a certain port, or if the ship be lost or captured in the course of the voyage. The *respondentia* interest is frequently at the rate of forty or fifty per cent, or in proportion to the risk and profit of the voyage. The *respondentia* lender may insure his interest in the success of the voyage, but it must be expressly specified in the policy to be *respondentia* interest, unless there is a particular usage to the contrary. This is settled by authority. A lender upon *respondentia* is not obliged to pay salvage or average losses, but he is entitled to receive the whole sum advanced, provided the ship and cargo

arrive at the port of destination; nor will he lose the benefit of the bond, if an accident happens by the default of the borrower or the captain of the ship; nor will a *temporary* capture, or any damage short of the destruction of the ship, defeat his claim.

Where bottomry bonds are sealed, and the money paid, the person borrowing runs the hazard of all injuries by storm, fire, etc., before the beginning of the voyage, unless it be otherwise provided. As that, if the ship shall *not arrive at such a place*, at such a time, etc., then the contract has a beginning from the time of sailing; but if the condition was that if such ship shall sail from a given place to any port abroad, and shall not arrive there, etc., then, etc., the condition has not its beginning till the departure (*Reade's Lex. Merc.*, 143; *Park.*, 626).

A lender on bottomry or *respondentia* is not liable to contribute in the case of general average, nor is he entitled to the benefit of salvage (*Park.*, 627, 629; *but vide Marshal on Insurance*, ch. 6, book 2).

These are principles pertaining to bottomry and *respondentia* bonds, and are fully explained in works upon shipping and insurance; and it is quite obvious that such transactions, when entered into in good faith, cannot be considered usurious, for the want of certainty, which characterizes a case of usury.

These statements with respect to bottomry and *respondentia* bonds seem pertinent in this place; but the general subject will be more appropriately discussed when the law of maritime loans shall be considered.

In the State of Massachusetts, an early case came before the Supreme Judicial Court, in which it appeared that the defendant gave the plaintiff a bond for a loan of money, to use at bottomry on a ship and her freight during the term of three years, at the interest of twelve per cent per annum; the defendant was to pay over to the plaintiff, from time to time, half of the gross earnings of the ship, and to make other payments if he chose, in part satisfaction of the bond, and the interest was to cease immediately on the amount of principal so discharged; and the plaintiff was to retain all payments made to him, whether the ship should be lost or not; and the freights were to stand hypothecated for only the balance which should at any time remain unpaid; and at or before the end of the three years the defendant was to pay the sum remaining due, with the interest, deducting, however, such sums as

the plaintiff would by law have been held to pay for any general average or partial loss which should happen during the three years, etc., etc.; and if the defendant fulfilled these conditions the bond was to be void. The defendant also gave the plaintiff a mortgage on real estate, which was to be void if the defendant performed the conditions of the bond. An action of debt was brought for the penalty of the bond, and the defendant interposed the defense of usury. The counsel for the defendant insisted that the instrument was not a bottomry bond, because the payment of the whole money lent did not depend upon the contingency of the ship's performing a particular voyage; or at all events, the whole amount of money was not to be at risk during the whole time; and because, in addition to the hypothecation of the ship, the payment of the principal, with interest at twelve per cent, was made certain by a mortgage of real estate, by an assignment of the earnings of the vessel, and by personal security. But the court held that the bond was a lawful contract and not usurious; for if the ship had been lost at any time during the three years, the plaintiff was to lose all the money which should be then due on the bond. Putnam, J., in delivering the opinion of the court, said: "It is argued that the payment of the money borrowed is secured in such manner as to make it a certainty that the plaintiff would receive his money, with twelve per cent; that it is secured by a mortgage of real estate, as well as by a mortgage of the ship, and an assignment of half the freight and earnings for the term of the loan; and it is further objected that the loan is upon time and not for a voyage, as it is usually made. But the answer to these objections is, that if the ship should be lost within the time of three years, for which the money was lent, the plaintiff was to lose all the money which should then be due on the bond.

It is the essence of the contract of bottomry and *respondentia*, that the lender runs the marine risk to be entitled to the marine interest. The rate of interest and the manner of receiving the payment of what may become due upon such contract are to be regulated by the parties. These considerations are not to be regarded by the court, excepting only to ascertain whether they were colorably put forth to evade the statute against usury. We do not see anything in the facts which would warrant that conclusion. If the ship had been lost immediately after she sailed, it is perfectly clear that the plaintiff would have lost all his

money" (*Thorndike v. Stone*, 11 *Pick. R.*, 183, 187). This decision was pronounced over forty years ago, and when usurious contracts in that State were void by statute, so that it may be regarded as a fair exposition of the law upon the question involved. And it may be added that it has often been said by judges, both in England and this country, that these maritime contracts ought to be treated with great favor by the courts. The obtaining money on bottomry bonds, especially in foreign ports by the master, is often absolutely necessary, in order that the vessel may be repaired and proceed on her voyage. And at home, the owner may often be obliged to pledge his ship, in order to fit her out for sea, and put her in a condition to become available. The true definition of a bottomry bond, according to Mr. Justice Story, "is a contract for a loan of money on the bottom of the ship, at an extraordinary interest upon maritime risks, to be loaned by the lender for the voyage, or for a definite period."

The same principle of hazard exempts from the charge of usury those contracts which are denominated *post obits*. These are transactions in which the borrower, in consideration of a sum of money paid *instantly*, assumes to give the lender a larger sum upon the death of some particular person or persons. Contracts in the form of a *post obit* have been recognized as binding obligations, both in this country and in England, from a very early period. And though, in some cases, it has been said that a *post obit* bond is a security of a questionable nature, and in point of fact there are instances in which the courts have relieved against such bargains, yet it does not seem that they have ever been considered as *usurious*, however gross and extraordinary they may have been; but merely looked upon as *unconscionable bargains*, against which relief can be obtained in a court of equity alone.

In a very early case in the English courts, the question was fully presented, and the doctrine was sanctioned by the court. The defendant had agreed with the plaintiff, who was to have an estate fall to her after the death of two old women, to give her £350 in consideration of being paid £700 at the death of the two women, and the plaintiff was to secure this £700 on a mortgage of her reversionary estate. It happened that both the women died within two years after the transaction, and a bill was filed to obtain relief against the bargain. The question was submitted without discussion, except that a single case was cited, where

relief was given in a similar case to the one at bar; only the plaintiff in that case had been prevailed upon through his necessities. Lord Keeper North said: "I do not see anything ill in this bargain. I think the price was the fair value, though it happened to prove well. Suppose these women had lived twenty years afterward, could Lloyd (the defendant) have been relieved by any bill here? I do not believe you can show me any such precedent. What is mentioned of the plaintiff's necessities, is in all other cases. One that is necessitous must sell cheaper than those who are not. If I had a mind to buy of a rich man a piece of ground that lay near mine, for my convenience, he would ask me almost twice the value. So where people are constrained to sell, they must look to have the fullest price. As in some cases that I have known, where a young lady that has had £10,000 portion, payable after the death of an old man, or the like, and she in the meantime becomes marriageable, this portion has been sold for £6,000 present money, and thought a good bargain too. It's the common case, pay me such interest during my life, and you shall have the principal after my decease" (*Batty v. Lloyd*, 1 *Vern. R.*, 141). It does not appear that this reasoning of Lord North has ever been contradicted, at least not in the English courts, if it ever has been in any of the courts of this country.

In a much later case in the High Court of Chancery of England, the same doctrine was laid down. John Spencer, in 1738, was possessed of an income of £7,000 per annum, and a large personal estate besides; and having contracted a debt of £20,000 to several persons, mostly tradesmen, by whom he was pressed, and which he was desirous to pay off, proposed to borrow money, and particularly a sum of £5,000, for that purpose. As he had a well-grounded expectation of a great increase of fortune on the death of his grandmother, the Duchess of Marlborough, if he survived her, he resolved to contract thereon. He was above thirty years of age; originally of a hale constitution, but impaired; and although afterward he lived more regular, yet he was addicted to several habits prejudicial to his health, which he could not leave off. The Duchess was seventy-eight; of a good constitution for her age, and careful of her health. Spencer publicly proposed that if any one would lend him £5,000 he would oblige himself to pay £10,000 at or soon after the death of his grandmother, if he survived her, but to be totally lost if she survived him. The proposition was rejected by

several knowing persons as not sufficiently advantageous, but was finally accepted by the defendant, and a bond of £20,000 conditioned to pay £10,000 was given on those terms. She lived six years and three months; he survived her one year and eight months. About two months after the old lady's death, Spencer executed to the defendant a new bond, in place of the old one, in the penalty of £20,000 conditioned for the absolute payment of £10,000 at or before April following, and executed also a warrant of attorney for confessing judgment thereon, which was afterward entered. After his death the defendant sued out a *scire facias* against his executors for an execution, and they resorted to the High Court of Chancery for an injunction and for relief on payment of £5,000, with interest from the time of advancing it, on the ground, among other things, that the transaction was usurious. The case was elaborately and ably argued before Lord Hardwicke, Lord Chancellor; Sir William Lee, Chief Justice; Sir John Strange, Master of the Rolls; Sir John Welles, Chief Justice, and Burnett, Justice; and it was unanimously held that the agreement was not usurious. Burnett, J., said: "Upon the state of this case, three points are made. First, that the original contract is usurious, contrary to the statutes, as being a greater *premium* than the law allowed; and if so, the new security will fall to the ground as well as the contract itself. * * * As to the first point, whether the loan of £5,000 to be paid £10,000 on the death of the Duchess if he survived her, but nothing if he died before her, is usurious, or a mere casual, contingent bargain? I hope I may be excused in calling it a loan; because, although in a case where the capital is not in all events to be paid, the word may be improper in courts of law, this court at least has adopted the use of that word in respect of a mere contingent bargain, that of *bottomry*. If this contract be usurious, it must be either because it is contrary to express words of the statute, or an evasion out of it. * * * To make a contract usurious within the express words of the statute, the reward must be taken for forbearance or giving a day of payment, and whatever shift is used it will be usury; but not within the statute when it is otherwise, if in truth it was a sum advanced by way of loan, and the reward in truth given for forbearance, no shift will prevail. * * * If, therefore, a man gives or lends money, not to be paid if the event should be one way, but double if the other, and it is uncertain which way it will

happen, it is not within the statute, for the reward is given for the risk, not forbearance; but if under color of such a hazardous bargain the real treaty is for a loan, with a usurious reward for that loan, and to evade the statute the contingency inserted is of little moment, being no ingredient between the parties, the court or jury on the whole may pronounce such a contract usurious, notwithstanding the color of contingency, if they are satisfied the reward is given for forbearance, not for the risk; as in the adding a single life, which is a healthy life, if that life should survive half a year: so they might as well add a contingency if any one of six persons was alive at the end of six months; and one of the cases is, if any one of these persons is alive at that time. The intent of the bargain is the material thing: if that was borrowing the money, it is within the statute, whatever colorable contingency inserted; and this is the sense of all the resolutions in the several cases. * * *

But when the principal was fairly and truly put in hazard, and such as none would run for the interest the law allows, there is no case where it has been held within the statute. The slightness or reality of the risk seems to be the only rule directing the judgment of the court (*Bedingfield v. Ashley*, Cr. E., 741; and in *Long v. Wharton*, 3 Keb., 304), which, though inaccurately reported, seems to me good law. I cannot see two contracts bearing a greater similitude than this and *bottomry*. A life may be insured, so may a ship, which may sink the day after, and so may the party die; one is as much an adventure as the other. * * *

On the whole, therefore, I am of opinion that this is not a contract founded in its origin upon usury, but a contingent bargain, and consequently within the express words or intent of none of the statutes of usury."

Sir John Strange, Master of the Rolls, said: "The questions upon which I am to offer my advice are three: 1st. Whether the original advancement of the £5,000 in the manner as deposed by Mr. Blackman, and disclosed in the defendant's answer, and the bond taken upon it, are to be considered as usurious, and consequently void in point of law. * * *

As to the first, I concur in opinion that this is not an illegal agreement made void by the statute of usury. * * *

The repayment of the money advanced depended on a contingency, which, if it happened one way, the whole was totally lost. During the pendency of this, no interest or profit could accrue to the defendant, but a mere wager or bargain upon contingency which died first; so that the whole was at hazard. * * *

Whether a hazard or not is considered as the rule for determining whether a bargain or a loan. I am of opinion, therefore, this bond does not come within the statutes of usury, and cannot be declared void at law thereon."

The lord chancellor said: "As three points have been properly made at the bar, it is necessary to say something to each. The first is a mere question of law upon the statute of usury and on the rules of law, and the same as, in a court of law, if an action had been brought on the bond, and the whole matter had been disclosed in special pleading. If I had even now a doubt concerning it, I should have held myself bound by the opinion of the judges as a matter within their conusance, in like manner as if I had sent this to be tried at law; in which case, the court always decrees consequentially to the trial. But I have no doubt about it; and concur in opinion. * * * Consider the result of the cases cited on the statute of usury, which I will not repeat, but only deduce natural and proper inferences from them. First, if there is a loan on contingency, in consideration whereof a higher rate of interest than the law allows is contracted for forbearance, if the risk goes only to the interest or *præmium*, and not to the principal also, though real and substantial risk is incurred, it is contrary to the statute; because the money lent is not in hazard, but safe at all events; and no regard is then had whether the contingency is real or colorable. * * * Next, if the contingency extends to both, and there is a higher rate than the law allows, regard is had whether a *bona fide* risk is created by the contingency, or whether only colorable; for, if so, courts of law hold it contrary to the statute, because it is an evasion to get out of the statute, which is prohibited by the law itself. * * * But where the contingency has extended to principal and interest both, and not colorable only, but a fair and substantial risk is created by the whole, it takes it out of the statute; though called a loan, it is considered as a bargain or chance, and differs little from wager. On this depends the case of *Bottomry*; for I agree that the approving thereof is from their being fair contracts on a real hazard, and not that they concern trade; though trade and commerce is taken into consideration, but not alone relied on to support usury, for that cannot be" (*Chesterfield v. Janssen*, 2 *Ves. R.*, 125, 141-143, 146-148, 153, 154).

In a still later case before the lord high chancellor, *post obit*.

bonds were established, though upon terms of gross inequality, on the alleged ground that such securities are not liable to be impeached for usury (*Wheaton v. May*, 5 *Ves., Jr., R.*, 27). And in the Court of Common Pleas of England, at an early day, contracts of this description were recognized as lawful and binding, although the court required strict practice in proceedings relating to them, for the alleged reason that a *post obit* bond is a security of a doubtful nature. A motion was made to enter up judgment on a warrant of attorney, on an affidavit stating that a bond for £1,800 was given by the defendant to the plaintiff in the year 1780, conditioned for the payment of £900, in consideration of £400 advanced at the time of the execution of it, on the death of the defendant's father, in case the defendant should survive, together with the warrant; that the father died in September, 1788, and the son was still living. The court said that "in common cases, where judgment has not been entered on a warrant of attorney within a year and a day from that date, it was necessary to apply to the court for leave to enter it. As this was a *post obit* bond, a security of a questionable nature, which had been often disputed with success, leave to enter up judgment ought not to be granted without a rule to show cause. If judgment be entered immediately on giving the warrant, or within a year and a day after, transactions of this sort may probably be brought to the knowledge of the family of the obligor, and a guard raised against fraud and imposition. But if the obligee waits till the death of the father or relative, the court will prevent his having immediate execution, by which he might force the obligor to submit to such terms as he should think proper to impose, and will require him to give due notice of his intention." For the reason stated in the opinion of the court, nothing was taken by the motion (*Lushington v. Waller*, 1 *H. Black. R.*, 94, 95).

In an early case in the Court of King's Bench of England the question was presented, and a *post obit* was sanctioned by the court. The action was upon a memorandum in these words: "Memorandum. In consideration of two guineas received of Aaron Lamago, Esquire, etc., I promise to pay him twenty guineas upon the demise of my present wife, Anne Gould." The only question made was whether the contract was usurious, the woman, at the time of making it, being then seventy years of age. It was argued by the plaintiff's counsel that it was not; that there was no forbearance, nor any certainty of receiving either principal or interest; that it

was a *mere contingency*. Lord Mansfield stopped him, under a doubt how it was possible to come at the question of usury, saying: "Here is nothing at all stated about the *loan* of money; it might, for aught that appears to the contrary, be a *voluntary gift*, to be made to him upon this event. The matter of usury was never thought of at the trial." Mr. Justice Denison said: "We cannot *intend* this to be a *usurious* contract; which is a crime. * * * It is a *foolish* bargain; but not usurious. Here are *no facts stated* upon which we can say it is *usurious*." And Mr. Justice Wilmot added, that "the *true distinction* was laid down in that case in Cro. Eliz., 643, between a *real bona fide wager*, not at all intended as a loan, and a transaction which is *really* a usurious *loan*, but *disguised* as a wager, with intent to have a *shift*" (*Lamego v. Gould*, 2 Burr. R., 715).

So where A., at B.'s request, advanced him £200, and took his warrant of attorney for payment as follows: £100 at Christmas, 1829, if both should then be living; £100 at Christmas, 1830, if both should be living then; and £100 at Christmas, 1831, on the same condition; the court, on motion to set aside a judgment on the warrant of attorney, refused to interfere, on the ground that there was a risk of the principal, the contingency being, if *either* of the parties happened to die. Sir James Scarlett argued for the plaintiff that the bargain was in the nature of a *post obit* bond, which is not illegal, however hard the terms may be; that the principal sum was in jeopardy, and the risk considerable; that this was a common way of doing business in the city, which became material when the question was whether the interest was a real one or only color; that the mere circumstance of the defendant having asked for a loan in the first instance was unimportant, as the contract ultimately made must determine the real nature of the transaction. The attorney-general, *contra*, did not contest the general principle in respect to *post obit* bonds, but argued that on the face of the transaction it was plainly a cover for usury. Lord Tenterden, C. J., said: "We do not think this a case in which the court can interfere. There certainly was a risk of the principal. The contingency was if either of the parties happened to die" (*Flight v. Chaplin*, 2 Barn. & Adolph. R., 112; S. C., 22 Eng. C. L. R., 38). And so also where the annual payments to be made on annuity (exceeding five per cent on the sum advanced) were secured upon land, and the principal sum by a policy on the life of

one of the grantees, with a covenant for payment of the annual premium, the English Common Bench held that the transaction was not usurious, the principal being still placed in some degree in jeopardy (*Howkins v. Bennet*, 7 C. B. [N. S.] R., 507). And in an early case, a wager between two, to have £40 for £20, if one be alive at such a day, was held not to be usurious (*Button v. Downham*, Cro. Eliz., 643). In many of the States, however, contracts of wager are declared void by statute; but such is not universally the law.

Upon the same principle of contingency or hazard, where persons are actually in partnership, an advantage to be taken out of the trade may be measured in any way agreed on without subjecting the arrangement to the charge of usury, for the money is not laying at interest, but employed in making profit, subject to losses; and although one partner retires, still *if he continues liable to be sued*, the agreement for such advantage cannot be usurious. The following case in the Court of King's Bench of England was decided in conformity to this principle: The action was brought on a bond in the penalty of £200 conditioned for the due performance of certain articles, which articles recited that Mary Morisset had lent Daniel King the sum of £100, to be repaid to her at the end of four years *without interest*; but, in consideration that the said Daniel King, his executors and administrators, should find and provide for Mary Dubois, daughter of the said Mary Morisset, the obligor, meat and drink in the house where he dwelt or should dwell for four years, if the said Mary Dubois should so long live; and that she should, during the said term, board with him, and that she should be co-partner with Mary King, wife of the said Daniel King, in the business of a milliner, and should at all times *have one moiety* of the losses and charges of carrying on the trade; and that they should be partners, and each do their utmost to carry on the trade, and *should equally divide the profits*; and also that the said Daniel King should lodge the said Mary Morisset, she paying him £10 a year; and, at the end of the four years, Daniel King was to repay the £100; and, in case of the death of the said Mary Dubois, to pay the principal, together with *lawful interest* for the £100, to the said Mary Morisset. The only question in the case was whether the bond was usurious, and the report states that the court were extremely clear that the case could not be within the statute of usury. Lord Mansfield observed that it

was impossible to say that King *might not* receive as much advantage by this partnership as to be worth the consideration; it *might* be a very advantageous bargain to King; here might be recommendation, skill, labor or other benefits arising to him from it. He mentioned the case of a man who entered into a private rent partnership with another, who drew him into a bankruptcy thereby. So here the plaintiff's daughter might have been drawn into a bankruptcy by means of this agreement, which would have been more severe to her, perhaps, than the penalty of the statute of usury would be. Mr. Justice Foster and Mr. Justice Wilmot concurred with the chief justice. They said it did not explicitly appear whether this was a prudent agreement or not, but it *might* be beneficial to King upon the *whole*; at least it was not such a contract as could be adjudged by the court to be usurious within the statute, and judgment was given for the plaintiff (*Morisset v. King*, 2 Burr. R., 891, 892; and *vide Anderson v. Maltby*, 2 Ves. Jr. R., 248). The same general doctrine is recognized by the American courts. In a case in the late Court of Chancery of the State of New York, three persons, Leonard, Quackenbush and Webster, agreed to purchase lands for their joint benefit; and they also agreed that Leonard should advance all the money upon the purchase, to be refunded out of the proceeds of the sale only, and that he should receive more than one-third of the land or the proceeds thereof. The court held that the agreement was not a contract for a loan or forbearance of money, and was not usurious. Stress was put upon the fact that, by the agreement, Quackenbush and Webster were under no obligation to reimburse Leonard for the moneys advanced, in case there was a deficiency in the sales of the land for that purpose; and it was declared, in substance, by the chancellor, that the transaction was neither within the letter nor the spirit of the usury laws (*Quackenbush v. Leonard*, 9 Paige's R., 346).

In the old Supreme Court of the State of New York an early case was decided on similar principles. Daggett and Kensett agreed with Hall that the former should carry on the business of preserving fresh provisions, and, in consideration of the use of \$600 advanced by Hall, made him their only agent for selling the provisions in the city of New York for ten years; agreed that he should be allowed twenty per cent on all sales made by him, or through his agency, in that city, or any other place where it might

be advisable to go for the trade, and that he should be entitled to one-third of the net proceeds of sale, after deducting the twenty per cent, to apply on the amount advanced, until it should be liquidated; Hall to furnish a repository at his own cost, and be responsible for his sales. The court held that the contract was not usurious. Savage, C. J., who delivered the opinion of the court, said: "The whole contract seems to me to show the commencement of a new adventure, a speculation, in which these parties were separately interested; and each was liable to loss, or, perhaps, might make large profits. * * * The lender here does not receive his interest and profits besides, nor is his principal otherwise at risk than as it may depend on the solvency of the borrowers, or their compliance with their contract. * * * The lender in this case renders personal services, and incurs other expenses in carrying on the business; and, after all this, his compensation depends upon an untried experiment in this new branch of business. It seems to me, then, that this contract is above all suspicion of usury" (*Hall v. Daggett*, 6 Cow. R., 653, 656, 657). And, in the New York Court of Common Pleas, it was held that an agreement to contribute capital for a joint business, and receive a share of profits in lieu of interest, is not usurious, unless it is a device to cover up the receiving of more than legal interest (*Quick v. Grant*, 10 N. Y. Leg. Obs., 344; and *vide Gilpin v. Enderby*, 5 Barn. & Ald. R., 954).

The same general doctrine, as applied to transactions between partners, has been recognized by the highest courts of England. The Frugal Investment Association was formed in 1845, and was certified under the 4th and 5th Wm. IV, ch. 40. Its objects were to advance the society's funds to its members, and to accumulate them, and to divide the profits periodically. The advances were made by putting up a share at one of the meetings for competition among the members, and the member offering the highest premium for it was entitled to that share, and as many more, to the number of twenty, as he chose to take at the same premium. For each share so taken he was to pay the premium agreed upon, and also eight shillings a month for 100 months (during which time only the society was to exist) as redemption money; and, on these conditions, he might have an immediate advance of £100, the full value of his share, on giving security for the repayment of it, together with such premium and redemption money; he was, also,

entitled to participate in the general profits of the society. B became a member, and obtained an advancement of five shares, at premiums of £71 for three and £73 for the other two; and he gave security as required, and received an advance of £500. B. died, and, on the society pressing for payment of the moneys so secured to them, B.'s executrix filed a bill against them, alleging that the transaction was usurious and the society illegal, and claiming to redeem the security on repayment of the £500, with legal interest only. The court held that the transaction, being between partners, was not usurious (*Burbridge v. Cotton*, 8 Eng. L. & Eq. R., 57).

CHAPTER XV.

TRANSACTIONS NOT USURIOUS—CONTRACTS IN THE FORM OF AN ANNUITY—SAME IN FORM OF A RENT-CHARGE—GENERAL CONSIDERATIONS.

CLOSELY allied in principle to contracts in the form of a *post obit* and the like, are contracts in the form of an annuity. A *bona fide* annuity for life, or lives, is, according to all the cases, exempted from the operation of the statute of usury. Annuities are held to be fair objects of purchase and sale, and there seems to be no objection on the ground of dealing in these securities, whatever may be the rates at which they may be purchased or sold. However the cases on the subject may differ in point of principle, the conclusion of all is the same. The statute does not reach such transactions, not only because the principal may be put at hazard, but because it is never the intention of the legislature to interfere with individuals in their ordinary affairs of buying and selling, or other arrangements made with a view to convenience or profit. The hazard which the grantor of the annuity runs of ever receiving an equivalent to his principal, says Mr. Comyn, may serve as a sufficient cause for such an exemption. And, indeed, this he thinks to be the proper footing upon which the decisions ought to be put; the argument which has been frequently urged for them, that they are purchases, not loans, supported as it is by the common remark that a previous communication about borrowing will render them usurious, not being, as he thinks, of so general an application

(*Com. on Usury*, 43). But the reason of the rule may be discovered in the cases on the subject, the principal of which will be considered.

One of the earliest authorities to be found in the reports upon the subject of annuities was in the Court of King's Bench of England. An information was brought against one Finch, for that he had given £566. 13s. 4d. to have annually £120 for and during twenty-three years, and that the defendants had accepted for the first year £120, which was more than the lawful interest according to the rate of £10 in £100, against the form of the statute. Upon not guilty pleaded, it appeared in evidence that Canfield came to Finch to borrow money upon interest; Finch, however, refused to lend the money upon interest, but said he would let him have it by way of annuity or rent. Upon this it was agreed between them that Finch should deliver to Canfield the £566. 13s. 4d., and that Canfield should assure to Finch the said annual rent of £120 issuing out of his land for twenty-three years. It was held by all the judges that this evidence did not prove any offense against the statute, for this kind of agreement is not corrupt; for it is not a contract commenced upon a corrupt cause, but an agreement for a rent, which it is lawful for every one to make. And that, in the space of twenty-three years, more money might *by possibility* be gained than at the rate of £10 in the hundred, is not material; for well might one contract for his advantage, if the other would have agreed to it, as Canfield had, in a manner of bargaining which was not prohibited by the statute. But it was said that if £12 in the hundred had been offered to be paid, and the other had said that he would accept it, but that this would be in danger of the law, and therefore he did not like to contract upon those terms, but that if the other party would assure him an annual rent for his money, then he would lend it, and upon this an agreement for the rent had been made, this would have been within the statute; but *quere* as to this last case. However, it appears that if one agrees to receive £12 in the hundred, and, to evade the law, they agree that a rent should be paid which exceeds the legal rate of interest, this would be within the scope of the statute, and would be punishable (*Finch's Case*, 1 *And.*, 121, *pl.* 169, *Temp. Eliz.*).

The same case is thus reported by Croke, the name of *Tanfield* being substituted for *Canfield*, which brings out the principle a little clearer than in the previous report: "Information upon the

13 Eliz., ch. 8, § 5, for usury. It was held by all the justices, upon evidence to the jury. Finch gave to Tanfield £566 for an annuity of £120 during twenty-three years. This is clearly no usury when there was no communication before between them to have any consideration for the *loan* of the £566; for this annuity was purchased *bona fide*, without any corrupt intent or bargain; and if it had been £40 *per annum* for forty years for £100, it had been no usury, no more than if one for £100 purchased lands worth £40 *per annum*.

“Another matter was in this case: That after the grant of the said annuity of £120 for twenty-three years for the said £566 in hand paid, Tanfield, for the assurance of the said annuity, infeoffed Finch of land worth £100 *per annum* to the use of Tanfield and his heirs, upon condition that if the money were not paid, it should be to the use of Finch in fee. And all the justices held that it was no usury; for the mortgage was only for the assurance of the annuity. Note.—In Doctor Goad’s case, Nisi, 13 Eliz., in the Exchequer, in an information for usury, Popham and Plowden held that if a man giveth £100 for an annuity of £20 *per annum*, this is no usury, for he shall never have his stock of £100 again. But Bell, Chief Baron, held clearly, if two men speak together, and one of them desireth the other to lend him £100, and for the loan of it he will give him clean £10 *per annum*, and for an evasion of the statute they invent this practice, that he shall grant to the other £30 *per annum* out of his land for ten years, or he shall make a lease for one hundred years to him, and the lessee shall re-grant it to him upon condition he shall pay £30 yearly and every year during the ten years; in this case, the first contract being corrupt in fraud of the statute, this is usury, although he never hath his £100 again. But if *bona fide* one buyeth an annuity of £40 for ten years for £100, this is no usury, if the first communication was not corrupt” (*Tanfield v. Finch*, Cro. Eliz., 27 E.; 26 Eliz., *ex relatione Edward Coke*).

In another case it was held that if one give £300 to another to have an annuity of £50 assured to him for 100 years, if he, his wife and four of his children so long shall live, that this is not within the statute of usury; so *if there had not been any condition*; but care is to be taken that there be no communication of borrowing of any money before (*Fuller’s Case*, Mich., 29 Eliz., 4 Leon. R., 208).

In another case upon a demurrer, in a replevin for £20 and an avowry, the plaintiff pleaded in bar that the defendant had given £100, and for that he granted to him £20 *per annum* for eight years annually, as a rent charge; and after that for two years more, if three men live so long, and concluded that it was a corrupt deed. And this difference was agreed by the court; if the original contract was for a rent charge, as in the case at bar, it is not usury, but a good bargain and pennyworth; but if the party had come to borrow the money, and then such a contract ensued by security, that is usury (*Dymonds v. Cockerill, Noy's R.*, 151).*

The same case, under a different name, appears to be reported in Browlow. In replevin, the defendant avows for an annuity for £20 granted for years, payable upon demand, and alleges a demand; the plaintiff demands *oyer* of the deed, and by the deed it appeared that for £100 one rent of £20 was granted for eight years, and another for £20 for two years, if E., R. and T. should so long live; the plaintiff pleads the statute of usury, and sets forth the statute and a special usurious contract. If it had been said to be upon a loan of money, then it was usury; but if it was a bargain for an annuity it is no usury, but this was alleged to be upon a lending (*Cothrel v. Harrington, Browl.*, 180).

Another case was debt upon an obligation of £300, conditioned for the payment of £20 *per annum* during the lives of the plaintiff's wife and son. The defendant pleaded the statute of usury; and how he came to borrow of him £120 according to the rate of £10 for every £100; who refused to lend the same, but corruptly offered to deliver £120 to him if he would be obliged to pay £20 a year during the plaintiff's wife and son's lives; and thereupon the defendant entered into the said bond for security of the payment of the said £20 a year to them, which is above the rate of £10 *per cent*, and so the bond supposed to be void; whereupon it was demurred. After argument on both sides, it was resolved that this being an absolute bargain in consideration for the payment of £20 a year during two lives, and no agreement to have the principal money, was out of the statute against usury; but if there had been any provision made for the repay-

* The authority of Noy's Reports has been doubted. And Twisden, Justice, in one case said, that the book was but an abridgment of cases by Sergeant Size, who when he was a student borrowed Noy's Reports, and abridged them for his own use (1 *Ventr*, 81). Still the reports are often referred to as authority, and it is presumed that the cases are in the main accurately reported.

ment of the principal, although not expressed within the bond, it had been a usurious agreement and lending within the said statutes. And of this opinion was the whole court, who adjudged it for the plaintiff (*Fountain v. Grymes*, *Cro. Jac.*, 252)."

According to another report of the same case, upon its being urged that it was within the statute, by reason of the one party's coming to borrow the money, and upon the other's offering to lend money upon this corrupt communication, and *that it had been so adjudged by the court below*; Williams, Yelverton and Fenner, judges, agreed that this was no corruption nor usury within the statute, but only a contract for a yearly annuity for a certain time, and for a sum of money; but otherwise it would have been, if there had been any provision made for the repayment of the said £100 unto him within any certain time, and in the meantime the yearly payment of the £20 annuity to continue, had been clearly a usurious agreement and lending within the statute (*Fountain v. Grymes*, 1 *Bulstr. R.*, 36).

In another ancient case the question was before the court, and the purchase of an annuity for thirty-nine years and three-quarters, determinable by the parties at the end of four years, was held not to be within the statute against usury, and was, therefore, a legal transaction. The facts of the case were these: One Brown agreed to assign to one Duer a lease of a house for forty years for the sum of £300. Duer not having the money, Drury, by agreement with Duer, paid the £300, took the assignment to himself, and then let the house to Duer for thirty-nine and three-quarter years, at a rent of which £30 was payable to himself. Drury covenanted that if at the end of four years Duer paid the £300, he would convey the residue of the term to Duer. Hale, C. J., said: "This is not usury within the statute, for Duer was not bound to pay the £300 to Drury. * * * It is no more in effect than a bargain for an annuity of £30 yearly, for thirty-nine and three-quarters years, for £300, to be secured in this manner, determinable sooner if the grantor pleases; but the grantee hath no remedy for his £300. * * * And so the acceptance of the £7 10s. is not usury. But if Drury had taken security for the repayment of the £300, or it had been by any collateral agreement to be repaid, and all this method of bargaining a continuance to avoid the statute, this had been usury" (*King v. Drury*, 2 *Lev. R.*, 7, 8; 23 *Car.*, 2).

But one of the best considered of the early cases was that of

Chesterfield v. Jansen, in which some very important *dicta* were thrown out upon this subject of annuities. Mr. Justice Burnett laid down the following rule: "Suppose a man purchase an annuity at ever such an under price, if the bargain was really for an annuity, it is not usury. If on the foot of borrowing and lending money, it is otherwise; for if the court are of the opinion, the annuity is not the real contract, but a method of paying more money for the reward or interest than the law allows, it is a contrivance that shall not avoid the statute, by giving the avarice of one kind of men an opportunity of preying on the necessities of another."

Sir John Strange said: "Some stress has been laid by the plaintiff's counsel on the word *bond*. But I think that concludes nothing as to the nature of the contract itself, but is a playing on words only. Every bargain of this kind is a loan; even bottomry contracts are so, and expressly called loans by act of Parliament. Therefore it is not the expression, but the nature and intent of the agreement, which must determine whether this contract be a simple loan or risk." And Lord Hardwicke, approving of this observation, goes on to say: "A man may purchase an annuity at as low terms as he can, but if he sets out at first with borrowing a sum of money and then turns it into the shape of an annuity afterward, this is a shift and an evasion to avoid the statutes. It is lawful, likewise, for a man to sell his goods as dear as he can in a fair way of sale; but if A. applies to B. to lend money, and offers to allow more than the real interest, and B. says 'no, I will not agree to your proposal on these terms, but I will give you cash or quantity of goods, and you shall pay me so much at a future time for them beyond the price I now fix,' and then charge an extraordinary profit, this is a shift to get more than the legal interest, and is usurious" (*Chesterfield v. Jansen*, 1 *Atk. R.*, 340, 346, 351).

And still another very interesting ancient case, involving the question, was this: Markham, an attorney, at the request of Robert Harding, rector of Grafton Regis, applied to Mrs. Mary Murray to lay out £130 on the purchase of an annuity of £20 a year for the defendant's life, charged on his rectory of Grafton, returnable by him at the end of the first five years upon the payment of £109 2s. There was no communication with her about a loan, but merely about the purchase of such redeemable annuity, although Harding had mentioned to his attorney (Markham) a wish to borrow £100

or upward. The case came before the court, and after due deliberation, opinions were delivered.

De Grey, C. J., said: "It is essential to the nature of a usurious contract, that there must be, 1. A loan. 2. That illegal interest is to be paid for such loan. It is essential to the nature of a loan, that the thing borrowed is at all events to be restored. If that be *bona fide* put in hazard, it is no loan, but a contract of another kind. * * * Communication covering a *loan* has sometimes infected the case and turned the case into usury. But then the communication must be *mutual*. Application for a loan is not such a case, provided the party applied to refuses a loan, and treats for an annuity, and this more especially when the party applied to is an attorney and the real seller is ignorant of the whole conversation. I know no case where even a meditated loan has been *bona fide* converted into a purchase and afterward held to be usurious. To be sure, it is a very strong and suspicious circumstance; but if the purchase comes out to be clearly a *bona fide* purchase, it will, notwithstanding, be good. Inequality of price is also a suspicious circumstance, especially if very inadequate. But this of itself will not make any contract usurious, though it may upon circumstances make it unfair and unconscientious, and, as such, relievable in equity. If a power of redemption be given, though only to one side, it is a strong circumstance to show it a loan, * * * but that alone will not be conclusive.

Another circumstance is the form of the instrument. If that imports a loan, and it was so meant, the contract may become usurious. At the same time, if the transaction be *bona fide*, the blunder of an agent shall not make it otherwise. * * * Subsequent acts of parties may also be material evidence of intention, unless properly cleared up and explained.

In the present case the principal is precarious, and secured only by the life of a clergyman and his continuing to be beneficed. The communication concerning the loan was only by application *ex parte* to an attorney, who refused it; the principal party being totally a stranger to it. The price comes out to be a fair market price for the annuity, or at least to be very little under it. The clause of redemption is entirely at the option of the seller, and affords him an opportunity of purchasing back the annuity at a price somewhat less than he took for it, in case at the end of five years he finds by his constitution, etc., he has made a disadvan-

tageous bargain. The inaccuracy of the notes in this instrument shall not vitiate a contract that otherwise seems to be a fair one. And the act of the attorney in levying so large a sum in execution is accounted for by his expressly swearing that he thought he could have no other remedy for future arrears, after the execution was once executed. Upon the whole, therefore, I cannot consider this in the light of a usurious contract."

The other judges agreed in this opinion, and Blackstone added that he did not know an instance where the principal was *bona fide* hazarded that the contract had been held usurious. "If the price be inadequate to hazard, it may be an imposition, and, under some circumstances, relievable in equity; but it cannot be legal usury. In the present case the principal part of it is clearly in jeopardy for six years together, and the purchaser cannot receive back his principal, with legal interest, unless the vendor continues to live for *eight* years. And though it is said that he might have insured at *five per cent*, yet that can only be done for a single year at a time. Here he undertakes to be his own insurer for a period of eight years together" (*Murray v. Harding*, 2 W. Blacks. R., 859; S. C., 3 Wils. R., 390).

The foregoing cases are mentioned by Mr. Robert Buckley Comyn, in his treatise on the Law of Usury, published in London in 1817, and, consequently, they are all very early even in the jurisprudence of England. In these cases annuities came before the court and were acquitted of usury; but in all these early cases they were assumed to be *purchases*, and, in some of them, it was directly stated that had they been *loans* they would have been illegal; for, unless there was a loan, the statutes of usury were considered as inapplicable to the transaction.

A modern case in the English Court of King's Bench, involving the legality of annuities, in which the transaction was sustained, came before the court in 1830. It was this: In the year 1805 James Stewart and John Crossett Pelham, in consideration of £1,000 paid to Stewart, granted an annuity of £120 to John Holland for the term of the joint natural lives of John Holland, Mary his wife, Mary Ann Holland and Lucy Dalrymple, and the lives and life of the survivors and survivor of the longest liver of them. And Stewart and Pelham, for themselves, their heirs, executors and assigns, within thirty days next after the death of such three of them, the said John Holland, Mary his wife, Mary Ann Hol-

land and Lucy Dalrymple, who should first depart this life, to insure in some respectable office of insurance in London, for the use of the said John Holland, his executors, administrators and assigns, the sum of £1,000, to be paid on the death of the survivor of them, the aforesaid survivors; and, upon the completion of such insurance, to make such assignment of the policy or policies thereof unto the said John Holland, his executors, administrators and assigns, as should be requisite to make over the same and all benefit thereof to him, and for his and their sole use.

The grantors executed also a warrant of attorney to enter up judgment for £2,000, but no judgment was ever entered up.

This annuity passed through several mesne assignments to Edward Gregory and Robert Johnston, who purchased the same of the sheriff under a writ of *venditioni exponas*.

In the course of the term of the court, Taddy, Sergeant, obtained, on the part of Stewart's executrix, a rule *nisi* to set aside the warrant of attorney, on the ground that the same was void for usury.

Wilde, Sergeant, showed error, and took the ground that there was no affidavit alleging the same to be a colorable transaction other than a *bona fide* annuity. He argued that the transaction was no loan, and therefore there could be no usury; that the principal was clearly in hazard; that if the two last lives had dropped at once, or the last life had dropped within the thirty days, and before the insurance had been effected, the covenant would have been of no avail. So, if the policy had happened to be avoided under any of the numerous stipulations on the part of the office.

The court called on Taddy to support his rule. He contended that it was a loan, for the covenant to insure was equivalent to a covenant for repayment. If the last life dropped during the thirty days, no insurance could have been effected. The covenant, therefore, meant that an insurance should be effected within the thirty days, and during the life of the survivor. The grantor, therefore, was in a better position than he would have been if he had only taken a covenant for the repayment of the money, which would have been clearly usurious; for here he had not only the clause of the policy, but if the partner omitted to effect it, an action against the grantor on the covenant to insure, by which he would recover the sum originally advanced; even if the two last lives had dropped at the same moment, the act of God would not excuse the grantor

from his absolute covenant. He could have pleaded no plea but performance.

Tindal, C. J., said: "The question is, whether an advance of money under the circumstances now laid before the court comes within the statute of Anne, or a loan of money on which a larger rate of interest than five per cent has been reserved. The general rule is, that there is no loan where the principal is placed in hazard, because a loan contemplates repayment of the money lent; and where there is no loan, it is a matter of agreement between the parties on what terms the money shall be advanced. In the present case the hazard was considerable. Suppose the third and fourth lives had dropped together, how could it be said that there was any breach of covenant in not insuring at the expiration of the third, if it could not be ascertained which perished first? But suppose the insurance had been effected, there are often clauses in policies which induce considerable hazard, as if the life insured were determined by suicide. Upon such a precarious mode of repayment we cannot say the parties intended a loan. The court is satisfied, on the ground that there is no affidavit imputing to the parties the intention of a loan, showing that the principal has never been put in hazard." Gazelee, J., concurred in the opinion of the chief justice.

Bosanquet, J., said: "I do not think this covenant is such a stipulation as constitutes the transaction a loan." And Alderson, J., referred to a case where an agreement to pay twelve per cent on the amount of the purchase-money of a vessel was held not usurious, though there was a covenant to keep the vessel insured, and said it was not distinguishable from the present act. The rule was discharged with costs (*In the Matter of Naish*, 7 Bing. R., 150; *S. C.*, 20 Eq. C. S. N., 81).

And in a very old case, not referred to by Comyn, the principle governing cases of annuity is clearly established. An action of debt was brought upon an obligation of £300, conditioned for the payment of £20 per annum during the lives of the plaintiff's wife and son. The defendant pleaded the statute of usury, and that he applied to the plaintiff to borrow of him £120 at the lawful rate of interest, but that he corruptly offered to deliver over £120 to him if he would be obliged to pay £20 per annum.

The court considered this as an absolute contract for the payment of £20 per annum during two lives; and no agreement being

made for the return of the principal, it was not considered usury. But, they stated, if there had been any provision for the repayment of the principal, although not expressed in the loan, the contract would have been usurious (2 *Coke's R.*, 252). This is a binding case, and the principle on which it rests does not seem to have been controverted by modern decisions.

In a somewhat later case in the English Court of King's Bench than that in the matter of Naish, on demurrer to a declaration framed on a contract which was in terms a purchase of an annuity for £20 for sixty years for the price of £200, the court held that they could not infer usury; that is to say, that the contract was not on its face usurious.

Lord Denman, C. J., said: "It appears to me that the transaction is not, on the face of it, necessarily void. Installments are made payable for a long course of years, and interest will be due on all that remain unpaid. The effect of this is a matter of calculation, upon which the opinion of a jury should be taken. If they were to find the transaction to be merely a cloak and device for usury, it would be bad; but it would be otherwise if they said, looking to the value of the annuity granted, that the transaction was a *bona fide* contract for an annuity. The court cannot determine this."

Littledale, J., said: "I do not say what a jury might find, if issue were joined on a plea of usury. But we cannot say that the deed is, on the face of it, usurious. It is clear that the plaintiff, as he does not receive back his principal, is entitled to more than five per cent. But we cannot take judicial notice that the money ultimately received will exceed the principal and legal interest."

Taunton, J., said: "For a long time the impression on my mind was the reverse of my present opinion. I accede to the suggestion of my brother Littledale. The principal money is parted with. At the end of the sixty years there is an end of both purchase-money and interest. The creditor is therefore entitled to receive more than what would be legal interest on a loan of so much. The objection is that, in the sixty years, this payment of the £20 would produce more than the principal and interest. But the court cannot judicially calculate the excess; it is a matter for a jury."

Williams, J., concurred, and judgment was ordered for the plaintiff (*Ferguson v. Spring*, 1 *Adolph. & El. R.*, 576; *S. C.*, 28 *Eng. C. L. R.*, 154, 156).

And in a recent case decided by the English Court of Common Pleas, it was held that where the annual payments of an annuity (exceeding five per cent on the sum advanced) were secured upon land, and the principal sum by a policy on the life of one of the partners, with a covenant for payment of the annual premium, the transaction was not usurious, the principal being still placed in some degree of jeopardy.

Erle, C. J., said: "The point mainly urged on the part of the defendant was, that this was a usurious transaction. A loan for more than five per cent interest secured upon land is still void for usury; but if the principal sum is not secured upon land, the usury laws have no application. Here the principal money was not secured upon land. The parties stipulate for the payment of an annuity, and the payment of that is secured on the land, but not the principal. It is said that this is only a cover and device to evade the usury laws, because the grantors covenant for the payment of the annuity for a period of sixty years, and part of the security was an insurance on the life of one of them, and the grantors contract to pay the premiums, and so the principal is never put in jeopardy. No doubt the risk is extremely small; but it cannot be said there is none. The insurance office might become insolvent, or the policy might become unavailing by reason of some of the many circumstances by which policies are vitiated. It seems to me that there is no foundation for the objection. The law prohibits the securing an advance of money upon land at a higher rate of interest than five per cent; and parties must take care not to violate the law. But it is a misapplication of language to call a transaction like this a device to evade the law. It is rather a case where the parties have obeyed the prohibition of the law by taking a security which is outside of the prohibition." Williams, J., said: "As to the last point, that the transaction was void as being an evasion of the laws against usury, no doubt, in one sense, granting annuities *is* an evasion of the usury laws. But parties are entitled to evade the law. A man is guilty of no offense who so conducts his affairs as not to infringe an act of Parliament. I see no objection to an evasion of the law in that sense. The usury laws do not apply where the principal is put in jeopardy. Here the principal was put in jeopardy. Reliance was placed upon the covenant to insure Bennet's life, as showing that the grantee incurred no risk of losing his principal. But still there is always

a risk that the policy may turn out to be unproductive." Willes, J., said: "Then it is said that the transaction was void on the ground of usury, inasmuch as this was a shift or device to enable the parties to obtain greater interest than five per cent secured upon land. As an illustration of what has been said by my brother Williams on this point, suppose a loan of £100 to be contracted for, of which £50 was to be received in coals or a horse or some other commodity or chattel intrinsically worth £5 only. That would be a shift to obtain usurious interest, and would be a case within the statute. It is clearly established that when the principal is put in jeopardy, the case is unaffected by the statutes against usury." Keating, J., said: "For the reasons already given, I entirely concur in the judgments pronounced by my lord and two learned brothers." Judgment accordingly (*Howkins v. Bennett*, 7 *J. Scott's R.*, *N. S.*, 507; *S. C.*, 97 *Eng. C. L. R.*, 507, 551-554).

The English authorities upon the subject of annuities have frequently been reviewed by the courts of this country, and the doctrine of the cases uniformly approved. The question underwent a thorough examination in the Supreme Court of the United States, forty years ago, and the general principles applicable to, and governing such cases, clearly laid down. One Scholfield, being seised in fee of four brick tenements and lots of ground in Alexandria, in consideration of \$5,000, granted to one Moore an annuity or yearly rent-charge of \$500, to be issuing out of and charged upon the houses and ground, and covenanted that the same should be paid to Moore, his heirs and assigns forever thereafter, with the right to distrain in case of non-payment of the same. In the deed granting the rent-charge, Moore, the grantee, covenanted that, at any time after five years, on the payment of \$5,000, with all arrears of rent, he, Moore, would release the said rent-charge, and the same should cease. Scholfield covenanted to keep the buildings in repair, and that he would have them fully insured against fire, and assign the policy of insurance for the protection of Moore, the money from the insurance to be applied to the rebuilding or repairing the houses, if destroyed or injured by fire. Afterward, Scholfield, by deed of bargain and sale, conveyed to one Lloyd, the plaintiff in error, the houses and lots of ground, subject to the payment of rent to Moore, who, since the same conveyance, had been seised of the same. The rent being unpaid, Moore levied a

distress for the same, and Lloyd brought replevin ; and the defense to the claim for rent set up to the recovery was, that the transaction was usurious, and the deed granting the rent-charge was, by the laws of Virginia, which controlled the case, absolutely void. The case came up on demurrer to the plaintiff's plea of usury to the defendant's cognizance justifying the distress under the indenture from Scholfield to the defendant. Upon the demurrer the Circuit Court rendered judgment for \$1,000, the double rent claimed in the cognizance, and the plaintiff brought error to the Supreme Court, where the judgment of the Circuit Court was reversed, although it was declared that the transaction between Scholfield and Moore was not usurious on its face. Mr. Justice McLean delivered the opinion of the court, and, among other things, said : " Assuming the position that the pleas contain no averments which extend beyond the terms of the contract, the counsel in support of the demurrer have contended that no fair construction of the deed will authorize the inference that it was given on a usurious consideration. It was the purchase of an annuity, it is contended ; and though the annuity may produce a higher rate of interest than six per cent upon the consideration paid for it, yet this does not taint the transaction with usury. If the court were limited by the pleas to the words of the contract, and it imported to be a purchase of an annuity, and no evidence was adduced giving a different character to the transaction, this argument would be unanswerable. An annuity may be purchased like a tract of land or other property, and the inequality of price will not, of itself, make the contract usurious. If the inadequacy of consideration be great, in any purchase, it may lead to suspicion, and, connected with other circumstances, may induce a Court of Chancery to relieve against the contract. In the case under consideration, \$5,000 were paid for a ground-rent of \$500 per annum. This circumstance, although ten per cent be received on the money paid, does not make the contract unlawful. If it were a *bona fide* purchase of an annuity, there is an end to the question ; and this condition, which gives the option to the vendor to repurchase the rent by paying the \$5,000 after the lapse of five years, would not invalidate. * * * The right to repurchase, as also the inadequacy of price, would be circumstances for the consideration of a jury. * * * Scholfield, it appears, was under no obligation to repurchase the annuity ; but he had the option of doing so after the lapse of five years, which

is a strong circumstance to show the nature of the transaction. The purchase of an annuity, or any other device used to cover a usurious transaction, will be unavailing. If the contract be infected with usury, it cannot be enforced. When an annuity is raised with the design of covering a loan, the lender will not be exempted by it from the penalties of usury (3 *Bos. & Pul.*, 159). On this point, there is no contradiction in the authorities. If a party agree to pay a specified sum exceeding the lawful interest, provided he do not pay the principal by a day certain, it is not usury. By a punctual payment of the principal, he may avoid the payment of the sum stated, which is considered as a penalty. When a loan is made to be returned at a fixed day with more than the legal rate of interest, depending upon a casualty which hazards both principal and interest, the contract is not usurious; but when the interest only is hazarded, it is usury. Does the decision in this case, as has been contended, depend upon a construction of the contract? Are there no averments in the pleas which place before the court material facts to constitute usury that do not appear on the face of the deed? If the court were limited to a mere construction of the contract, they would have no difficulty in deciding that the case was not strictly embraced by the statute'' (*Lloyd v. Scott*, 4 *Peters' R.*, 205, 224, 225). The court were of opinion that a case of usury was made by the facts stated in some of the pleas demurred to; hence the judgment of the Circuit Court was reversed, and the cause remanded, with instructions to overrule the demurrer to such pleas, and permit the defendant to plead.

The case was then got in readiness, and came on for trial before the Circuit Court and a jury, when evidence was taken, and the questions submitted to the jury under proper instructions by the court, and a verdict found for the plaintiff, adjudging the transaction to be usurious. A judgment was entered on the verdict, and the defendant sued out a writ of error, and the case came a second time before the Supreme Court. On this last occasion the case was most thoroughly argued, and all of the authorities reviewed, and an uncommonly able opinion was pronounced by Mr. Chief Justice Marshall, in which he came to the conclusion that it was proper to submit the case, with all its circumstances, to the consideration of the jury, and to have the question, whether the contract was, in truth, a loan, or the *bona fide* purchase of an annuity, to them, but he was of the opinion that the court below erred in

admitting Scholfield as a witness for the plaintiff; and therefore the judgment should be reversed, in which the court unanimously concurred, and the cause was remanded for a new trial (*Scott v. Lloyd*, 9 *Peters' R.*, 418).

The case of *Scott v. Lloyd* is technically one of rent-charge, instead of an annuity, and yet, so far as the question of usury is involved, it is the same as the case of an annuity. Strictly speaking, an annuity is not a ground-rent, although it is frequently confounded with it. A rent-charge is a burden imposed upon and issuing out of lands, whereas an annuity is a yearly sum chargeable only upon the person of the grantor. But, as before remarked, the same facts which will constitute usury in the one case will equally affect the other, and hence, in considering the question of usury, the two are treated as precisely alike. To purchase land under its real value is clearly not usury. So neither is it usury to purchase a charge upon such land for less than it is really worth. And however rent-charges and annuities may differ in other respects, the one must, in this instance at least, stand upon the same ground as the other. As purchases and "good pennyworths," they may be valid (*Vide Rowe v. Bellaseys*, 1 *Sid. R.*, 182).

It will be observed that the courts have sometimes used language to the effect that the mere circumstance of inequality of price will not vitiate the sale of an annuity, provided there be no communication for a loan, and the question naturally arises as to what is meant by this communication. Most annuities are granted only to raise money to supply the necessities of the grantor, and if it is meant that a communication of the necessities to the proposed grantor would render the transaction usurious, it has been very justly said few annuities would stand against such an interpretation. And the courts uniformly declare that a *bona fide* contract for an annuity can never be usurious where there is no agreement for repayment of the principal. So the obvious meaning of the expression is, that the annuity shall be absolutely sold, without any stipulation for the return of the principal, and that it shall not be intended as a means of paying interest until such principal is returned. But the rule will be more apparent in the examination of cases held to be usurious, notwithstanding the transaction assumed the form of an annuity.

As to the risk, which must be considered as the very life of the annuity, while it is not a downright purchase, it can only be said

that where it is real and *bona fide*, the annuity will be valid; and where it is weak and colorable, the annuity must fall. No precise and certain rule as to what risk will suffice, can be laid down, as every case must entirely depend upon its own circumstances.

It has been said that the insurance of the life upon which the annuity is granted destroys the risk during the time that such insurance continues. Supposing, however, the annuity to have been good in its origin, there is no good reason to suppose that the subsequent indemnification of the grantee would vitiate it, especially as such indemnification must be continued from year to year, and the legality of the transaction might be continually detected and re-established, according to the annual precaution or neglect of the annuitant. But it might be different where a part of the *original contract* is, that such an assurance should be made by the grantor. Yet even in that case, supposing it be conceded that the insurance effected on the life of the grantor by the annuitant will not render the annuity usurious, it would be difficult to contend, as Mr. Comyn well says, that it would be rendered usurious by an insurance for the benefit of the grantee effected by the grantor; for as in both cases it is in fact the grantor who pays both the annuity and insurance, it seems hard to say that the usury is incurred by his paying them in two sums, where it would not have existed if he had paid them in one gross sum (*Com. on Usury*, 69, 70).

CHAPTER XVI.

TRANSACTIONS NOT USURIOUS—INTEREST IN THE NATURE OF A PENALTY, OR WHERE THE SAME MAY BE AVOIDED BY PROMPT PAYMENT OF THE PRINCIPAL—TRANSACTIONS WHERE STOCKS ARE LOANED OR TRANSFERRED—SALES OF DEPRECIATED SECURITIES.

It has been several times affirmed that whenever the principal and interest, or the principal only, are in hazard, it is not usury to take more than the rate of interest prescribed by law; but that where the interest alone is put in hazard, while the principal is secured, the contingency will not exempt the agreement from the effect of usury. One exception, however, has been made to this latter rule, and that is, when the exorbitant profit is reserved in

the nature of a penalty to be paid upon some default, which the borrower may avoid by the payment of the principal, and so defeat the interest. The rule was thus stated by a distinguished English judge: "If I secure both interest and principal, if it be at the will of the party who is to pay it, it is no usury; as if I lend to one £100 for two years, to pay for the loan thereof £30, and if he pay the principal at the year's end he shall pay nothing for interest, this is not usury; for the party hath his election, and may pay it at the first year's end, and so discharge himself" (*Roberts v. Trenayne, Cro. Jac.*, 509). But an examination of the cases involving the principle will the better illustrate the rule. The cases are numerous, both ancient and modern.

One of the early cases in the time of Lord Coke was this: Thomas Woodhouse and A. G., Esquire, mutually agreed that in consideration of £100 given by the said A. G. the said Thomas would grant to the said A. G. and his heirs the rent of £20, under condition that if the said Thomas should pay to the said A. G. the £100 on the 17th of July, 1580, then the said rent should cease. The court said it was a plain bargain and purchase conditional of such rent, and no usury. It was in the election of the grantor to have paid the £100 and to have frustrated the rent, so that the grantor (as the nature of usury is) was not assured of any recompense for the forbearance of £100 for a year, and the £20 *per annum* is but a penalty to the grantor, and assurance to the grantee, for the payment of the said £100. But it was resolved by the whole court, that if it had been agreed between the grantor and the grantee that, notwithstanding such power of redemption, the £100 should not be paid at the day, and that the clause of redemption was inserted to make an evasion out of the statute, then it had been a usurious bargain and contract within the statute. For if in truth the contract be usurious against the statute, no color or show of words will serve, but the party may show it, and shall not be concluded or estopped by any deed, or any other matter whatsoever; for the statute gives averment in such case (*Burton's Case*, 5 *Coke's R.*, 70).

In another early case, a copyholder mortgaged his estate, and it was agreed that if the mortgagor did not pay the money at the day, he would give the mortgagee £60 more, or £6 *per annum*, until he paid the £60; and the court held that there was no usury in the transaction, but only *nomine pænæ* (*Oliver v. Oliver*, 2 *Roll.*

R., 469). And in another case it was said by Holt, Chief Justice: "If I covenant to pay £100 a year hence, and, if I do not pay it, to pay £20, it is not usury, but only in nature of a *nomine pænæ*" (*Garnet v. Ferot*, *Camp. R.*, 133; and *vide Nicholls v. Maynard*, 3 *Atk. R.*, 520).

In Brooke's Abridgement it is said that if a man for £100 sell his land upon condition that the vendor or his heirs repay the same before Easter next, or the like, then he may re-enter; this is not usury; for he may repay it the next day, or any time before Easter, and so there is no sure gain or profit of the land; but, on the other hand, if there be a condition that the vendor shall repay the money on a certain day a year or two afterward, paying interest in the meantime, this is usury, for then there is certain profit; and it would be the same if the vendee should lease the land to the vendor under the like terms (2 *Bro. Abr.*, 326, *title Usurie*). This is a very fair illustration, and brings out the principle and presents the distinction in accordance with the early cases (*Vide Shep. Touchst.*, 62; *Brown v. Barkham*, 1 *P. Wms. R.*, 652; and *Turton v. Benson*, 2 *Vern. R.*, 764; *S. C.*, 10 *Mod. R.*, 445).

In these cases, it will be observed, the principal was never hazarded, but it was only the profit or interest upon the principal of which the lender could be deprived by the act of the borrower. In the case of *The King v. Drury*, referred to in the previous chapter, the principal was never secured, and might never have been repaid; but still it was in the debtor's option to defeat the interest by the payment of the principal. That case, therefore, illustrates the rule that there can be no usury when the exorbitant interest may be avoided by a prompt payment of the principal at the option of the borrower, as well as the rule that there can be no usury in the *bona fide* purchase of annuities. Other ancient cases may be referred to, which are ranked in the same class.

One case much relied on in the Court of King's Bench of England was this: The action was brought against the defendant for goods sold and delivered at three months' credit, with an agreement at the time of the sale that in case the money was not paid at the end of three months, then the defendant should pay to the plaintiff a halfpenny an ounce per month for so long a time as the money should remain unpaid. At the trial it was proved that this allowance was the general usage and practice of the trade, with one or two exceptions only; but upon calculation it appeared to exceed

the legal rate of interest. Upon its being objected that the contract was usurious, Lord Mansfield said that he thought there seemed to be weight in the usage of the trade, and in the circumstance of its being in the defendant's power to have avoided the additional payment by discharging the principal sum when it became due; and the jury accordingly found for the plaintiff. Upon a motion for a new trial, his lordship concluded that general usage could not protect usury; but he thought, in addition to the grounds relied on at the trial, that there was no pretense for supposing this to be a *borrowing* or *loan*, and therefore the rule was discharged (*Floyer v. Edwards*, *Cowp. R.*, 112). The suggestion of Lord Mansfield, that the case was free from the taint of usury because it was not one of *borrowing* or *loan*, may be open to some criticism, for the reason that it is well settled that there may be usury in cases of forbearance of debts already incurred by means other than *borrowing*; and such has been recognized as the law from a very early period (*Vide Pollard v. Scholey*, *Cro. Eliz.*, 20). But the decision of Lord Mansfield can be sustained upon the principle laid down in the exception referred to in the commencement of this chapter. The goods had been sold at a certain price, which was to be forborne for three months, without (as it appeared) any interest or remuneration for such forbearance; but if the debtor did not pay the price at the expiration of that period, if he chose to increase the time of forbearance, he was to pay for this increase after a rate greater than the statute allowed, and the court held that he might lawfully do this, and that too from a string of unshaken decisions. Lord Mansfield's judgment in the case, however, seems to have proceeded upon the ground that the transaction was that of a *bona fide* sale, and no loan; still, the principle of the payment of interest being optional with the debtor, and its defeasibility being in his power, was adverted to in the opinion, and may be considered as sufficient to support the decision.

Among the early cases decided upon the principle under discussion, though later than that of *Floyer v. Edwards*, may be cited the following, which arose in the High Court of Chancery of England: The defendants entered into an agreement for the purchase of two houses from the plaintiff, for the price of £431 10s., possession to be given and £200 paid immediately, and the remainder, with legal interest, at Michaelmas; but if the balance was not then paid, it was agreed by the parties that the defendants should pay,

"in lieu of interest upon the same, a clear rent of £42 per annum," out of which the plaintiff was to deduct interest at the legal rate in respect of the sum first paid to him. The bill was for a specific performance of this agreement, which was resisted on the foundation of usury. Lord Kenyon, when master of the rolls, decreed for the plaintiff, from which decision the defendants appealed. It was contended on behalf of the defendants that this was a usurious contract, for the purchase was complete, and the agreement therefore was to give more than legal interest; and it was expressly stated in the agreement to be in lieu of interest for the forbearance of that part of the debt which it was agreed should be paid at Michaelmas. On the contrary, the plaintiff's counsel insisted that the defendants were under no obligation to remain the tenants of the plaintiff any longer than they chose; that if they saw fit to pay the money at the day specified, they ceased to be tenants and became purchasers; and that, as the defendants had an election to put an end to the affair, the transaction was not usurious. Lord Commissioner Eyre said: "The language of the agreement gave it, to my mind, the appearance of usury; but when one defines usury, and looks at the spirit of the agreement, the first impression does not seem sufficiently strong to sustain the defense. Usury is the taking of more than £5 *per cent* for the forbearance of a debt. The first question therefore is, was there a debt? I think not; the whole rested upon an executory agreement, which for performance depended on many circumstances which might prevent its ever becoming a debt. This, however, is a narrow ground; take it on the more general ground, as disclosed by the proceedings, — the contract was for a title, and almost for ready money. Possession till the completion of the title was a fair subject of contract between the parties. In the event of the money not being paid, a new idea appears to have occurred to the parties as to the possession. The bargain for title was to be suspended, and a new relation to arise between the parties, namely, that of landlord and tenants. If so, there is nothing usurious. If they turned themselves into these characters, the plaintiff might well be entitled to rent till he put the estate out of him." The decree was affirmed (*Spurrier v. Mayoss*, 4 *Brown's Ch. R.*, 28).

According to the report of this case of *Spurrier v. Mayoss*, by Vesey, Jr., it would seem that the decision was put upon the ground that the contract was for the purchase of houses, and not

for the forbearance of money ; and that no conveyance having been perfected, the legal estate was still in the vendor, and therefore it was competent to the parties to consider themselves in the light of landlord and tenant. Says Lord Commissioner Eyre, according to this report : " If that was the true nature of the agreement, upon the merits there is nothing usurious ; for if he turned himself into a sort of debtor as to the £200 paid, paying interest till the rest should be paid, he must be considered in justice and equity entitled to the interest in the estate till conveyed out of him, which puts him into the situation of landlord, and then he might receive a rent till he became seller by receiving the money and conveying the title."

Lord Commissioner Wilson said : " The plaintiff, proprietor of two houses, agrees to sell them. They were not thus sold, for if so, there must have been a conveyance ; but there was an agreement for that in the usual course, when the purchase-money should be paid. ' Then,' says the plaintiff, ' if you do not pay at Michaelmas, it being one of the terms of the agreement that immediate possession should be given, I will account at the rate of £5 per cent in respect of the money paid, which is to be considered as lent to me, and you shall pay a rent of £42 per annum.' It is as legal as if he had said he wanted the money at Michaelmas, and if it should not be paid, they should pay, for these premises £300 ; for it is a contract for the purchase of houses, not for forbearance of money" (*Spurrier v. Mayoss*, 1 *Ves., Jr., R.*, 527, 532-534). Which is the more accurate report of the case, that of Brown or Vesey, Jr., is not certain. But it would seem from the facts, as is stated by both reporters, that the case could have been disposed of upon the ground laid down in the report by Brown.

Another strong English case may be referred to: A. was indebted to B. in the sum of £80, and gave his promissory note for £87 3s., payable by four quarterly installments (being the amount of this principal and legal interest), with a clause in it which provided that, in case default should be made in payment of any one installment, the whole sum should immediately become payable. The court held that this was not a stipulation for usury, but for a penalty ; and that A. was entitled to recover the whole sum, on default being made in the payment of the first installment (*Wells v. Girling*, 4 *Moore's R.*, 78 ; *S. C.*, 1 *Brod. & Bing. R.*, 447 ; *S. C.*, 5 *Eng. C. L. R.*, 733).

And so late as the year 1852, the same doctrine was asserted and acted upon by the English courts. A case occurred in which usury was sought to be established in a security for a loan, from the circumstance that the money was not advanced until some time after the date of the instrument, which called for interest from that date at the rate of five per cent. But there was a provision in it by which the creditor agreed to receive interest at the rate of four per cent only if it was promptly paid. This reduction of interest, if the debtor availed himself of the provision, would more than countervail the excess which would have arisen out of the antedating of the instrument. And it was held that this was an answer to the imputation of usury, because the debtor, by making punctual payment of the interest, would not have paid beyond *five per centum per annum* (*Long v. Storie*, 10 *Eng. Law and Eq. R.*, 182).

The distinction to be made between the cases of penalty and the common cases of exorbitant interest is, where the interest is precarious from some extrinsic event, and where it is liable to be avoided by the act of the party. In the former instance, the transaction would be usurious. In the latter, it would not be. The propriety of the distinction has sometimes been questioned, on the ground that the exception to the general rule in respect to the hazard of the interest may offer facilities for evading the statute against usury by a secret understanding that the penalty shall be forfeited and no redemption made; an understanding, which though it might be used to avoid the agreement as between the parties themselves, would completely deprive a stranger of the manner of enforcing the penalties of the statute. But it is not necessary to inquire into the foundation of the distinction; it is sufficient that it is recognized by the courts.

Although all of the foregoing cases upon the subject are from the English reports, yet the same doctrine has been repeatedly held by the courts of this country. The rule was, a long time ago, laid down by the Supreme Court of the United States, in just so many words, that where a party agrees "to pay a specific sum exceeding the lawful interest, provided he do not pay the principal by a day certain, it is not usury, for the reason that by a punctual payment of the principal he may avoid the payment of the sum stated, which is considered as a penalty" (*Lloyd v. Scott*, 4 *Peters' R.*, 225, *per McLean, Justice*).

The same doctrine was held in an early case, in the State of Massachusetts, referred to in a previous chapter. A party gave to his creditor his note for the amount he owed him, on time, payable in oats at twenty cents a bushel, when oats were worth at least thirty-three cents a bushel, with the express understanding that if the maker would pay cash within a stipulated time he need pay only the face of the note. Upon suit brought on the note, it was contended on behalf of the defendant that the note was usurious; that the making it payable in specific articles was a mere color to avoid the statute. On the contrary, the counsel for the plaintiff insisted that the contract was not usurious, because it was in the power of the defendant, by discharging it at a certain time, to avoid paying more than the original money, and that without any interest at all. The court took the latter view of the subject, and held that, where, by the terms of a contract, the party may, by payment at a day certain, avoid any stipulated penalty, such contract is not usurious (*Cutler v. How*, 8 *Mass. R.*, 257).

The same principle was controlling in an early case in the State of Connecticut, although the doctrine was not referred to in the disposition of the case. The defendant was owing \$129.84, and gave his note for \$150 at ninety days, with the understanding that if he did not pay the actual indebtedness in ten days the note might be sold in market, or otherwise disposed of, to raise the amount. The debt not being paid, the note was sold for \$139, and the defense of usury was interposed against it; but the note was held to be a valid contract, and free from the taint of usury (*Tuttle v. Clark*, 4 *Conn. R.*, 153). And in an earlier case in the same State, the court held, that a contract to return certain public securities by a certain time, or to pay a certain sum in lawful money, less than the amount, at the option of the promisor, was not usurious, and that there was no room for a hearing in chancery upon such a contract, as to damages (*Wadsworth v. Champion*, 1 *Root's R.*, 393).

In the State of Virginia, a similar doctrine has been laid down. An agreement was entered into between a commission merchant and his debtor, to whom he granted indulgence, that he should be allowed the usual commission, according to the course of trade, for selling tobacco, to be shipped to him by such debtor in payment for his debt, and that such commission should be allowed also, in the event of his debtor's failing to ship the tobacco. The court

held that the contract was not usurious, and declared that a penalty inserted in a contract, from which the party may deliver himself, does not make such contract usurious, and that the law is the same where it is in the power of the party, by a compliance with his contract, to convert the penalty into a compensation for services rendered by the other party. Roane, J., in giving the unanimous opinion of the court, said: "As to the contract contained in the deed, we see nothing objectionable in it. Donald and Burton, having a ready-money claim against Baylor, were neither compellable to wait for payment nor to receive tobacco. Being, moreover, commission merchants, trading in that article, they might justly connect with the contract of payment, one inuring to their benefit in this last character. This (as a shipment was intended) was no loan injurious to Baylor; he must have paid *somebody* for selling it, and the compensation is found and agreed to be reasonable. As they, under their contract, were compellable to sell the tobacco, it was competent to Baylor to bind himself to ship it, and to assess the damages in case of non-compliance with their stipulations. We are of opinion that, in the event which has taken place, of a non-shipment of the tobacco, although the term '*commission*' is kept up in the deed, it becomes, in truth, only the agreed damages or penalty for a non-compliance with the contract. If the tobacco had been shipped, as was contracted for, all would have been right, and the compensation now objected to would have been secured by the sale of the tobacco. We are all of the opinion that a penalty inserted in a contract, from which a party may deliver himself, does not make the contract usurious, and that the law is the same where it is in the power of the party, by a compliance with his contract, to convert it into compensation for services rendered" (*Pollard v. Baylor*, 6 *Munf. R.*, 433).

And in another case in the Court of Appeals of the same State, it appeared that A. proposed to B. that he should buy his land, which was advertised to be sold under a deed of trust for the amount of the creditors' debt, and should let him (A.) have it again upon payment of principal and interest at the end of twelve months, instead of which they entered into an agreement that B. should attend the sale and bid the amount of the creditors' debt for the land, and if it was struck off to him, that he should resell it to A. for a sum thereafter to be agreed upon, provided it was paid within twelve months. B. accordingly bid off the land. The

sum at which B. was to resell the land to A. was never agreed upon, though it was understood that it should be such a sum as would reimburse B. the money paid, the sacrifice he might make to obtain it, and liberally compensate him for his trouble. The court held that this contract was not usurious, but was a valid agreement between the parties; and further, that if the money was not paid to B. within twelve months, nor the sum fixed, the purchase was absolute (*Jones v. Hubbard*, 5 *Call's R.*, 211; and *vide Jansen v. Lewis*, 2 *Stewart's R.*, 426).

In the State of Iowa, the question came squarely before the Supreme Court, and it was held that an agreement to pay a sum of money by a day certain, and more than legal interest afterward, by way of penalty, if the debt be not punctually paid, is not usurious. The action was upon three promissory notes, payable respectively in six, nine and twelve months from date, each of which notes contained a provision as follows: "If not paid punctually when due, we promise to pay, as a penalty for the default, two and a half per cent per month from maturity till paid." To which action the defendants answered, denying the indebtedness, and alleging that the notes were usurious on their face. The plaintiff demurred to so much of the answer as pleaded usury, and the demurrer was sustained by the court. Stockton, J., said: "The agreement to pay the penalty of two and a half *per centum per month*, in default of payment of the principal sum and interest when due, formed no part of the consideration of the several promissory notes, or either of them, and consequently does not affect them with the taint of usury. The agreement was in its language and terms a penalty to secure the faithful performance of the original contract. If this contract had been performed by the defendants, and the money paid according to the terms and effect of their undertaking, at the time the promissory notes fell due, there would clearly have been no usurious interest paid or received. The defendants then had it in their power to obviate the objectionable portion of the contract of which they complain, and by their own act free the promissory notes of the supposed taint of usury, to which they now object. Where a party agrees to pay a sum of money by a day certain, and more than legal interest afterward, by way of penalty, if the debt be not punctually paid, such agreement is not usurious. The authorities to support this point

are numerous" (*Gower v. Carter*, 3 *Iowa R.*, 244, 252; and *vide Shuck v. Wright*, 1 *G. Greene's R.*, 128).

And in a recent case before the same court, the authority of *Gower v. Carter* was recognized and the doctrine confirmed. The plaintiff brought his action upon a promissory note dated January 1, 1868, for \$170.10, and "if not paid when due, with interest at ten per cent from date." The court held that the note by reason of the stipulation as to the ten per cent interest, was not usurious. Wright, J., said: "It will be seen that there was no evidence that interest to the 1st of January, 1868, was included in the note, and that ten per cent was agreed to be paid on the amount thus computed from the date of the transaction or loan. Upon its face the contract seems to be fair and not unusual. Whether the ten per cent be called a penalty or interest, the note would not be tainted with usury, for by the statute it is competent to contract for and take ten per cent. If defendant was, at the date of the note, owing \$170.10, then, under the law, plaintiff would take his promise to pay ten per cent from the date, leaving the payment of the interest so reserved depend upon the prompt payment of the principal at maturity. And upon the face of the note this is all there is of the case" (*Fisher v. Anderson*, 25 *Iowa R.*, 28 29; and *vide Wilson v. Dean*, 10 *ib.*, 432).

In the State of Mississippi, the Supreme Court has held that an agreement in a promissory note that, if the note be not punctually paid at maturity, it should bear interest from the date, though the consideration for which it was given might not be complete until its maturity, is not usurious, and that interest will be computed according to the terms of the agreement (*Rogers v. Sample*, 33 *Miss. R.*, 360).

And in the State of Indiana, in a case where a mortgage reserved ten per cent, and provided that the land might be exposed to sale if both principal and interest be not paid at the time the same shall become due, to satisfy said principal and interest, with *five per cent damages* and all costs, the Supreme Court held that the contract was not usurious; declaring that the *ten per cent* was the lawful rate of interest, and, as to the five per cent damages, it was entirely optional with the mortgagor whether he would pay the same or not; that they were in the nature of a penalty for the want of punctuality in paying the debt when due, and that this saved the contract from the taint of usury (*Gambrill v. Doe*, 8

Blackf. R., 140; and *vide Billingsley v. Dean*, 11 *Ind. R.*, 331).

So, also, in the State of Illinois, the Supreme Court has held that where, by the terms of a contract, a party can discharge himself by paying the real amount due, the transaction is not obnoxious to the statute against usury. The action was upon a promissory note for \$500, payable four weeks after date, "with ten per cent interest after maturity." The defendant pleaded that the note was usurious. The plaintiff demurred to the plea, and the court sustained the demurrer, at the circuit, and the defendant appealed to the Supreme Court, where the judgment of the Circuit Court was affirmed. Treat, C. J., in delivering the opinion of the court, said: "The demurrer was properly sustained to the second plea. The only pretense for holding the contract usurious was the fact that a greater rate of interest than the law allowed was to be paid after the note became due. That circumstance did not taint the transaction with usury. The interest was in the nature of a penalty to secure the punctual payment of the debt. It was in the power of the maker to avoid the payment of interest altogether, by the prompt payment of the principal. * * * On this point the law seems to be well settled" (*Lawrence v. Cowles*, 13 *Ill. R.*, 577-579).

The same doctrine, in its broadest sense, has been repeatedly sanctioned, and cases decided in accordance with it, in the State of New York. In a late case in the Court of Appeals, the rule was applied. A party was indicted in the Court of Oyer and Terminer for the offense of receiving usury, contrary to the statute, and the indictment was sent to the Sessions, where the trial took place. The indebtedness arose upon a bond and mortgage held by the defendant; when the principal was due, the debtor gave the defendant an agreement in these words: "If I do not pay N. Sumner the \$800 I owe him by December 5, 1857, I will give him sixteen dollars extra. John Burdick. November 30, 1857." A receipt for the sixteen dollars was indorsed on the agreement, when it was given in evidence. It was proved that the whole \$800 and interest was paid, together with the sixteen dollars, the latter at or shortly after the paper was signed, but no part of the \$800 was paid until about the 1st of February, 1858. This was the substance of the testimony against the defendant, except a witness testified that the defendant admitted to him that he had been paid in the transaction two per cent extra besides the interest. The defend-

ant's counsel moved that the court direct a verdict for the defendant, for the reason that the sixteen dollars extra was taken on a contract for a penalty for the non-performance thereof, and not for a loan or forbearance of money. The motion was denied, and the defendant excepted. The defendant's counsel also requested the court to charge that, if the sixteen dollars extra was paid to the defendant by Burdick, "on the happening of any contingency over which the said Burdick had a control, it was not usury." The court declined so to charge, and the defendant excepted. The jury found the defendant guilty, and the court sentenced him to pay a fine of \$100. The judgment was affirmed by the Supreme Court, and the defendant brought the same into the Court of Appeals for review, where the judgment was reversed, by a vote of five of the judges against three. Ingraham, J., who delivered the prevailing opinion of the court, said: "Upon the trial, the judge submitted to the jury the question whether money had been taken. This, of course, involved the inquiry whether the written agreement was intended as a cover for usury, and the jury have found that it was. With that ruling or finding we cannot interfere. * * * And the decision of the jury, if there were no errors in the instructions, would bind the parties. The judge was asked to charge the jury that, if the sixteen dollars was to be paid by Burdick on the happening of any contingency over which the said Burdick had control, it was not usury. This was refused. To constitute usury there must be either a payment or an agreement by which the party taking it is entitled to receive more than seven per cent. If the payment is conditional, and that condition is within the power of the debtor to perform, so that the creditor may, by the debtor's act, be deprived of any extra payment, it would not be usurious. * * * I think the judge erred in refusing to so instruct the jury, and that the judgment should be reversed therefor. It is said, in the opinion delivered at the General Term: 'It is clear that the contract, on its face, was not usurious, and we should presume that the court charged the jury that upon its face it was not usurious, because such a charge would be correct.' I am at a loss to see upon what ground a court has a right to presume a judge charged correctly in the face of a refusal to charge what the law is conceded to be. On the contrary, when the judge refuses to charge a plain proposition of law, the presumption is that he holds the law to be otherwise, and his refusal is based thereon." Denio, Ch. J., delivered

a very able dissenting opinion, in which he expressly assented to the general doctrine that, whenever it is in the power of a borrower of money to pay the principal within a limited time, without the usurious interest, upon non-payment the reservation of a larger sum than the statute allows is no usury. He also conceded that the contract at bar was not usurious on its face; that is to say, if it was a sincere and honest agreement, the undertaking was not usurious. But he contended that contracts of this character ought to be narrowly watched; for, if the penalty was a mere contrivance to avoid the statute of usury, the arrangement will still be held usurious; that, in this case, the day named for the payment of the principal sum was only five days from that on which the arrangement was made, and, hence, there was pretty strong reason to believe that the sixteen dollars was paid to obtain a longer extension than the five days; so that the finding of the jury was quite satisfactory; and, on the whole, he was of the opinion that the request to charge the jury in respect to the rule which was conceded to be the law was too strict and absolute, and was, therefore, properly refused. In this opinion, Selden and Johnson, JJ., concurred; but all the other judges being in favor of reversal, the judgment was reversed (*Sumner v. The People*, 29 *N. Y. R.*, 337. 339-345; and *vide The Bank of Chenango v. Curtiss*, 19 *Johns. R.*, 326).

It may, therefore, be safely affirmed that the law is well settled upon authority, that, though more than legal interest be reserved on a contract upon the loan of money, yet, if it be part of the agreement that the borrower may discharge himself from payment of any interest at all, by repayment of the principal on a certain day, the case does not fall within the provisions of the statute against usury. And, probably, the same rule would be recognized in a case where the borrower may discharge himself from payment of the *exorbitant* interest simply by prompt payment of the principal and *legal* interest; that is, if it clearly appear that the extra sum is required, in good faith, to secure prompt payment of the true amount due.

On a similar principle, a loan of stock is not usurious, nor the payment of the dividends in the meantime, even though they exceed the legal rate of interest; but, as the temporary transfer of stock in the public funds is an engine of usury not unfrequently resorted to, the courts are wary to examine such cases, to determine

the real nature of the transaction. However, it is well settled that the mere loan of stock, if made in good faith, is not usurious.

One of the very earliest cases upon this subject, in which the transaction was sustained, was an action in the English courts, on a bond dated the 24th day of March, 1786, in the penalty of £1,550 6s., to which the defendant pleaded usury. It appeared in evidence that the defendant had applied to one T. Wellings (to whom the plaintiff was executor) to advance him a loan of money, which the testator consented to do, upon the defendant's promising to him the same interest that he received in short annuities, that is to say, eight and a half per cent; it was, therefore, settled that the money should be raised by the sale of short annuities, to the amount of £912 12s. 6d., which the defendant was to replace in the same stock by the 1st of September, 1785; but, if it was not replaced by that time, he was to repay that sum on the 1st of January, 1786, and in the meantime to pay such interest as the stock would have produced. There was no actual transfer of the short annuities to the defendant himself; but the stock was really sold to some other person, and the defendant received the produce of it the same day. Lord Kenyon left it to the jury to say whether it was intended as a *bona fide* loan of stock, or as a loan of money, and the present device a mere color for receiving more than legal interest. The jury found that the transaction was a fair and honest loan of stock, and gave the plaintiff a verdict. A rule for a new trial was obtained; upon showing cause against which, it was urged that the defendant having it in his power to replace the stock any time before September, 1785, during which interval the testator ran the risk of the stock falling, and the defendant replacing it upon such a fall; and that the testator was only to receive what he would have received in case he had not sold his stock. In support of the rule, it was contended that though a contract for the loan of stock, to be replaced *at all events*, be legal, yet, as there was an alternative to replace it, on a given day, *or to repay it in money*, with more than lawful interest, it was usury. The court, however, were of a contrary opinion; and, as the jury had negatived the color of usury, they thought themselves bound to consider it a fair transaction, and accordingly discharged the rule (*Tate v. Wellings*, 3 Term R., 531).

In a later case, the defendant was possessed of £400 in three per cent consols, and it was agreed that, in consideration that the

plaintiff would loan to the defendant £160 from the 5th of May, 1801, to the 11th of February, 1804, the defendant would, within seven days after the 11th of February, 1804, transfer to the plaintiff the sum of £400 three per cent consols, or pay such sum of money as the £400 would produce on the 11th day of February, in case it was sold. It was proved that the value of the £400 stock, when the agreement was made, was £240, and, at the time of the action, brought £225. It was contended that this was usury; for, as the stock was worth £240, and as the plaintiff had only paid £160, he had gained £80 by his bargain, and the dividends in the meantime; that it might be said there was a contingency, because the three per cents might fall to twenty or thirty per cent; but that this was an impossible supposition. But Lord Ellenborough said, that whatever remedy the defendant might have in equity, on the ground of this being a catching bargain, he had none at law; that contingency in the thing purchased was incompatible with the idea of usury, in which the principal must always be certain. It was admitted that if the stock, when transferred to the plaintiff, would be worth but £160, it would not be usury; although it was very improbable that the stock would suffer that most extraordinary depreciation, still it was within the reach of possibility. He could not, therefore, say that there was not some contingency in the transaction, and he was, consequently, of opinion that the contract was not usurious (*Pike v. Ledwell*, 5 *Esp. N. P. C.*, 164). In this case, the doctrine of contingency seems to be carried to a great length. It would seem, from the reasoning of Lord Ellenborough, that an accident barely within the scope of possibility was as effective in the premises as one that may *probably* occur; whereas, in one important and well-considered case, it was observed that the *slightness* or *reality* of the risk seems to be the only rule directing the judgment of the court (*Chesterfield v Janssen*, 1 *Atk. R.*, 340, per Burnett, J.).

In another case in the English Court of King's Bench, the plaintiff declared upon a bond, dated the 19th of November, 1803, for £972 9s.; and, upon a plea of usury, it appeared that the defendant had been indebted to the plaintiff in £486 4s. 6d., for which the plaintiff had sued him; but being unable to pay it, he agreed that, in consideration that the plaintiff would forbear his action till the 19th of November, 1804, he would give him a bond to transfer to the plaintiff, on the 19th of November, 1804, so

much stock as £486 4s. 6d. would purchase at the then present day's price, which would amount to £908 16s. 7d., together with such interest as the same would have procured as such stock in the meantime; and accordingly the bond in suit was given. Lord Ellenborough having left it to the jury to say whether this was a fair transaction or a mere color for usury, they found for the plaintiff. On a motion for a new trial, Lawes contended that the consideration of the bond, as set forth in the condition, was usurious upon the face of it, however fairly intended by the parties, as it was evident that more than the legal rate of interest was received by the plaintiff for the loan of £486 4s. 6d., during the twelvemonth, upon the price of the stocks. But all the court agreed that this was not usury, as the amount of the sum to be paid by the defendant depended upon a contingency; and if the stocks had fallen in the meantime to £50, the plaintiff would have received less than his principal and the legal interest would have amounted to; that this was no more usury than an agreement to replace stock lent, which, though once contended to be usury, if more than the principal and legal interest were thereby obtained, had been long settled to be legal. If, indeed, this had been a mere color for usury, it would not have availed; but that was negatived by the jury, and nothing appeared to impeach the fairness of the transaction. And the court, in conclusion, held that the transaction was, in effect, a loan of stock. The plaintiff would have purchased stock at the price it stood at on the 19th of November, 1803, if he had received his debt then; but he was content to take his debt in stock, to the same amount, at a future day; that is the case with every contract for the replacing of stock. The intention of the parties to a loan of stock is that it should be sold, and the same quantity of stock repurchased at a future period by the borrower (*Maddock v. Rumball*, 8 *East's R.*, 304).

The foregoing are leading English cases upon the subject in connection with the sale or loan of stock, in which the transactions have been held to be free from the taint of usury; from which it may clearly be deduced with regard to contracts to replace stock at a future day, according to the then state of the market, that, if the lender be not certain whether by the stocks being replaced at the given day he shall be a loser or gainer, any gain which he may obtain by the replacing will not taint the

agreement with usury ; but if, on the other hand, he has so made the agreement that he is secure from loss, and has a chance of gain, this, by taking away the contingency, deprives the transaction of its legality. And perhaps this may be regarded as the criterion by which to determine the question in all these cases.

The subject of this chapter, in the precise form in which it is presented in the English cases, does not seem to have been frequently before the courts of the United States, although those cases are uniformly recognized as authority here, and several cases involving similar principles have been decided by our courts. In the late Court of Chancery of the State of New York, before the vice-chancellor of the eighth circuit, it was held that an exchange of depreciated securities for bonds and mortgages of the same nominal amount and of greater value, not being intended as a cover for a loan, was a sale, and free from the taint of usury ; and it was declared that the fact that the assignee of the bonds and mortgages guaranteed their payment did not change the nature of the transaction (*Western Reserve Bank v. Potter, Clarke's R.*, 432).

Substantially the same doctrine was held in the same court before the vice-chancellor of the first circuit. The plaintiff had subscribed for \$10,000 of the stock of a banking association, and applied, as he alleged in his bill, to the association for a loan, and it was arranged that the association would transfer to him, at par, \$50,000 of the five per cent stock of the State of Maine, which was then a depreciated stock, and worth in the market about ninety per cent, and bought by the association at that value, and issue to the plaintiff the \$10,000 of the capital stock of the association subscribed for by the plaintiff ; in consideration of all which the plaintiff should execute and deliver to the association his bond and mortgage for \$50,000 ; and the business was consummated accordingly. An action was commenced against the plaintiff by the association upon his bond, and the bill was filed in the Court of Chancery to stay the suit at law, and to procure a decree that the bond and mortgage be given up to be canceled for usury, and a temporary injunction was issued. The answer of the defendant denied that there was any loan, but as to the \$50,000 of Maine five per cent stock, it was a sale to the plaintiff, who volunteered and chose to take it at par. The defendant made a

motion on the bill and answer to dissolve the injunction; on which the vice-chancellor decided that there was no usury in the transaction, and ordered the injunction dissolved (*Willoughby v. Comstock*, 3 *Edw. Ch. R.*, 424).

The vice-chancellor, in the case of *Willoughby v. Comstock*, rested his decision upon a case previously decided by the Supreme Court of the United States, in which Mr. Justice Story, who delivered the opinion, said: "If the application be not for a loan of money, but for an exchange of credits or commodities, which the parties *bona fide* estimate at equivalent values, it seems difficult to find any ground on which to rest a legal objection to the transaction. Because an article is depreciated in the market, it does not follow that the owner is not entitled to demand or require a higher price for it before he consents to part with it. He may possess bank notes, which to him are of par value, because he can enforce payment thereof, and for many purposes they may pass current at par, in payment of his own debts, or in payment of public taxes; and yet their marketable value may be far less. If he uses no disguise; if he seeks not to cover a loan of usury under the pretense of a sale or exchange of them, but the transaction is *bona fide* what it purports to be, the law will not set aside the contract, for it is no violation of any public policy against usury" (*Bank of the United States v. Waggoner*, 9 *Peters' R.*, 378, 401).

In an early case in the Court of Appeals of the State of New York, it appeared that a party purchased of a banking association \$15,000 of its stock at par, and executed his bond and mortgage to secure the payment of the amount; that when the transaction was consummated, the price of the stock in the market was below par, although the purchaser received it at its nominal value, and it was objected in an action to foreclose the mortgage that it was usurious and void. The court, however, held that it was not usurious for a banking association to receive a mortgage from an applicant for stock and issue to him therefor an equal amount of its stock, although when the transaction is consummated the price of the stock in market is below par.

Gardner, J., said: "The defendants Pell and wife object to the validity of the bond and mortgage in controversy. First, upon the ground of usury. Second, upon that of fraud on the part of the association. There is no foundation for the first objection in

the pleadings, nor for the second in the proofs. The case shows that Pell intended to exchange, and did exchange his bond and mortgage for the stock of the company; that when issued to him it was worth ninety-eight cents upon the dollar; that he has disposed of it according to the purpose stated in his answer, and has received and appropriated the avails to his own use. The defense, if successful, would give him \$15,000 in the stock of the association or its proceeds, without consideration, and enable him to cast upon the creditors and *bona fide* stockholders of the company the loss arising from his own improvidence. * * * Assuming the validity of the bond and mortgage, the only remaining question will be whether the State of Ohio, through the agreement and assignment stated in the bill, obtained such a title to the securities as will be recognized and enforced in a court of equity" (*Talmadge v. Pell*, 7 N. Y. R., 328, 339, 340).

In the old Supreme Court of the State of New York an action was brought upon a promissory note, and the defense of usury was interposed. The evidence given at the trial showed that one Bonnell loaned the defendant \$300 in bills or notes of the corporation of the city of Rochester, on his promissory note of that amount at sixty days, payable in current money. A part of the note was paid, and the note in question given for the balance. At the time of the giving the first note, the corporation bills were at a discount of from three to five per cent; but the defendant said, when the loan was made, that they would answer his purpose as well as current money. The note in question was passed in the usual course of business to the plaintiff before due, and for a full consideration. The defendant asked the court to charge the jury, 1. That the note was usurious; 2. That it was void, having been given for notes issued by the city of Rochester without authority, and which could not be enforced against the corporation. The judge declined so to charge, and the defendant excepted. The jury found a verdict for the plaintiff, and the defendant moved for a new trial on a case. The motion was denied, and on the question of usury, Nelson, Ch. J., who delivered the opinion of the court, said: "The learned judge was also right in refusing to charge the jury that, as matter of law, the note was void on the ground of usury. Perhaps he might have been bound to put the point to them as a question of fact, if he had been requested to do so; but the weight of the proof was decidedly with the plaintiff. It is true, the city notes were from

three to five per cent below par; but the defendant sought the accommodation on the ground that they would answer his purposes the same as current funds. Indeed, the whole case negatives any intent on the part of the lender to gain a usurious advantage in the transaction" (*Rockwell v. Charles*, 2 Hill's R., 499, 501).

And in a late case before the present Supreme Court of the State of New York, a decision was made involving the principle, and in accordance with the rule laid down in the foregoing cases. The plaintiff claimed to recover the amount of two promissory notes made by the defendant and indorsed to the plaintiff. The defense was usury. The notes were for the amount of their face, in bills of a bank located in another State, which were not bankable in the city of New York, where the note was given, being subject to a discount, known to both parties, but which passed freely at par in ordinary business transactions, the defendant stating that he wanted the money to use elsewhere, and that the notes of such bank would answer the purpose. The greater part of the bills received by the defendant were used in his business. The justice presiding at the trial charged, among other things, as follows: "The defense of usury, however, is good against a *bona fide* holder, and in reference to that I charge you, that if the notes in suit were given under an arrangement that they were for bills of the Valley Bank at par, when they were known to be at a discount, then you must find for the defendant." And "if Leland made such an arrangement as he intended to make, and the effect of it was that he would get more than seven per cent for the use of his money, the transaction was usurious, although he may not have intended to get more than seven per cent."

The plaintiff duly excepted. A verdict was rendered for the defendant, upon which judgment was entered; and the plaintiff appealed from an order subsequently made denying a new trial, and the court at General Term reversed the judgment and granted a new trial.

The opinion of the court was delivered by Bonney, J., who said: "We are of opinion that the portions of the judge's charge, above quoted, were exceptionable, and that there should be a new trial in this action. The application under which the notes in suit were received was for a loan in Valley Bank bills on specified security for one year, and it appears that bills of the bank were not received

in payment or deposit by the banks in the city of New York, and that they were purchased by brokers at one per cent discount; but they passed freely, at par, in ordinary business transactions; and there was no proof or pretense that Leland & Co. did not receive the bills at par, or that Dillaye used them in his business at less than their par value. Under the circumstances, we think both Leland & Co. and Dillaye may have known that bills of the Valley Bank were at a discount—that is, were not ‘current’ at bank—and were so redeemed or purchased at New York at less than their par value, and yet the transaction between them not be necessarily usurious. * * * We are also of opinion that if Leland did not make the very arrangement which he intended to make, and the effect of that arrangement was to give him more than at the rate of seven per cent per annum for the use of his money, which it was not his intention to get, the transaction was not *necessarily and per se* usurious. * * * The agreement for the loan may have been in fact and in the intent of either or both of the parties thereto corrupt and usurious; but, as we think, it may also have been otherwise. And whether it was usurious or not, was a question of fact, which should have been submitted to and determined by the jury” (*Robbins v. Dillaye*, 33 Barb. R., 77–80).

In a late case in the Court of Appeals of the State of New York, it was held that where the transfer of a chose in action is coupled with a loan of money, though the security prove uncollectible, the transaction is not necessarily usurious. The action was upon a promissory note for \$356.97, made on the 16th September, 1857, and payable two months from date; the consideration of which was a loan of \$200 in cash, and the transfer of a note against a third party for \$150, payable in hemlock lumber at seven dollars per thousand, guaranteed by the lender of the money, and some other small items to make up the amount. The defense was usury, and it appeared on the trial that the maker of the lumber note was insolvent at the time of the transfer. The defendant requested the court to charge the jury that if the lender made it a condition of the loan of the \$200 that the borrower should take the lumber note and give the note in question for the amount of both the money loaned and the lumber note, that alone would render the note usurious, unless the plaintiff should show that the lumber note was in reality worth the amount for which it was given; and in addition to this proposition, that if the jury found the lumber note

to have been worthless, the transaction was usurious, although the holder at the time had no knowledge that it was worthless, but supposed it to be good. The court refused to so charge, and the defendant excepted.

The jury found a verdict for the plaintiff for the full amount of the note and interest, on which judgment was perfected, and an appeal was taken to the General Term of the Supreme Court, where the judgment was reversed. The plaintiff then appealed to the Court of Appeals, by which latter court the decision of the General Term was reversed, and the judgment on the verdict affirmed. Porter, J., said: "The judge instructed the jury, in substance, that, though the transfer was coupled with the loan, and though the note finally proved non-collectible, by reason of the insolvency of the maker and indorser, this would not render the loan usurious, if Wood, at the time, believed the parties to be perfectly solvent, and if the transfer was made in entire good faith and without any usurious intent. This was a correct and accurate statement of the law applicable to the facts. * * * The judge also declined to charge that, if the purchase of the Morrow note was a condition of the loan, the transaction was usurious, even though Wood, at the time, supposed that security to be perfectly good. The authorities already cited show that the request was properly refused" (*Thomas v. Murray*, 32 *N. Y. R.*, 605, 609, 612). Judge Porter, in his opinion, seems to think that an early case in the old Supreme Court of the State mainly turned on the precise question which he had under consideration; and the case may be very properly referred to here to illustrate the doctrine under consideration. The suit was brought to foreclose a mortgage. The defense was, that it was executed to secure, among other things, a usurious loan of \$6,500. The alleged usury consisted in a stipulation that the borrower should receive \$5,000 of the amount in bills of the Bank of Niagara. That bank had suspended specie payments more than a month before the loan. Its bills were greatly depreciated, and were commonly refused on any terms for business purposes. These bills had been turned out by that bank, with other collaterals, to secure its own indebtedness to the Mechanics' and Farmers' Bank. The officers of the latter, at the time the bills were sent to Stuart, still hoped that the Niagara Bank would retrieve its affairs. Soon after the loan, it proved to be

insolvent. The chancellor held that, though there was a stipulation that the borrower should receive the money in those bills, and though they proved in the end to be worthless, the burden was upon the borrower to show that the lender knew this at the time of the loan; and as he had not established this, the transaction could not be regarded as a device to cover a usurious exaction. The case was then taken to the Court of Errors, where the decision of the chancellor was unanimously affirmed. Chief Justice Spencer, who delivered the opinion of the court, said: "The question is, whether this was a loan of money contrary to the statute; whether the respondents, under the device of lending part in the bills of their own bank and part in the bills of the Bank of Niagara, have, in effect, intentionally and knowingly, taken more than at the rate of six per cent interest for the loan and forbearance of money. I say, *knowingly and intentionally*; for it cannot be pretended that, unless the respondents knew that the bills of the Niagara Bank were depreciated, and not intrinsically worth their nominal amount, and intentionally put them off at their nominal value *with such knowledge*, it would be a case of usury. * * * I cannot find in this case evidence warranting the court in saying that the respondents knew, or had reason to believe, when the loan was effected, that the Bank of Niagara was insolvent, because it had refused to redeem its bills in the winter preceding, or because their negotiation for a loan had failed" (*Stuart v. Mechanics' and Farmers' Bank*, 19 Johns. R., 508, 510, 511).

And in the State of Tennessee the Supreme Court held that where depreciated stocks are sold for their nominal value, to be paid for in bulk at a given time, the transaction is not necessarily usurious. An action was commenced in the Circuit Court upon the obligation following:

"For and in consideration of Georgia State bonds, amounting to \$2,250, in the hands of Samuel S. M. Doak, this day ordered to me by Samuel Snapp, I, Samuel W. Doak, promise to pay to the said Snapp interest on said bonds, at the rate of six per cent, in half-yearly payments, from this date. And I moreover promise to pay, on or before the 5th of April, 1845, to the said Snapp, or order, the \$2,250 in Georgia State bonds, or their equivalent in other money." For security a tract of land was conveyed in trust, by the same interest. A bill was filed in chancery to enjoin the

action, and for a decree declaring the contract usurious. The Court of Chancery made a decree in the case, declaring that the transaction was not usurious, and the complainant appealed to the Supreme Court, where the decree was affirmed.

Caruthers, J., delivered the opinion of the court, and said: "There must be an attempt and purpose, by some shift or device, to evade the usury laws. It would not necessarily follow, if the bonds were sold for their nominal value, where they were much depreciated, to be paid in full at a given time, that it would be usurious. That would depend on the intention and purpose of the parties, whether it was a contrivance to get usurious interest or not. The stocks, or even depreciated bank notes, might be worth to the purchaser or borrower more than they would then sell for; or even the lender might prefer to keep them, for the chances of improvement in value, rather than part with them at less than the amount for which they called their face. Upon the whole, we think the decree is right, and affirm it" (*Doak v. Snapp*, 1 *Coldw. R.*, 180, 183, 185; and *vide Turney v. State Bank*, 5 *Humph. R.*, 407).

In the State of Florida, the Supreme Court has held that where there is a loan of bank notes, which, though depreciated at the time, yet serve and pass as money, both the borrower and lender acting *bona fide*, regarding and treating the notes as money, the transaction is not usurious. It was, of course, found in the case that there was no shift to evade the statute against usury, as both parties acted in perfect good faith (*Hayward v. Le Baron*, 4 *Fla. R.*, 404).

And the Circuit Court of the United States of the seventh circuit held that depreciated bank notes may be sold in the market at a greater or less price, as may be agreed upon between the parties. Like any commodity, they can be bought and sold without usury. But that any device or cover which may be resorted to, to evade the statute of usury, is corrupt and usurious. Mr. Justice McLean said: "The agreement to purchase from the plaintiff \$1,000 in notes of the Bank of Illinois, for which a note for \$1,000 was given, to be discharged on the payment of \$500, was not a usurious transaction, if there was a *bona fide* purchase of the Illinois notes, and in this view it is immaterial whether the notes purchased were worth more or less than the price agreed to be paid.

They were worth, as averred in the plea, only thirty-seven and a half cents on the dollar. The price, it would seem, agreed to be paid was fifty cents on the dollar. But, if the purchase was *bona fide*, there was no usury. The notes were not money, but promissory notes, the same as the notes of an individual, and when brought into market may be sold like other commodities for what they will bring" (*Judy v. Girard*, 4 *McLean's R.*, 360-362). These cases will suffice to illustrate the uniformity with which the rule referred to has been applied in transactions of alleged usurious exaction in connection with the sale or exchange of stocks and other securities, and they are the leading cases to be found reported upon the subject.

CHAPTER XVII.

TRANSACTIONS NOT USURIOUS—CASES WHERE USURY HAS BEEN INCURRED BY MISTAKE—WHERE THE EXCESSIVE INTEREST IS RESERVED OR PAID AS A GIFT—OF COMPOUND INTEREST, SEMI-ANNUAL INTEREST AND THE LIKE.

It has been stated in a previous chapter that in order to bring a transaction within the statute against usury there must be a corrupt *intention* in the contracting parties; and that if illegal interest be taken or reserved *by mistake*, the parties are not to be prejudiced thereby, because the intent is essential to the usury. A reference to some of the leading cases will illustrate the doctrine, and show what transactions the courts regard as coming within the rule.

A very early case in the English courts was this: An agreement was made on the 23d day of May, 1617, to lend £120 for a year, and a bond given for repayment of the said £120 with interest of £12 upon the 24th *day of May next ensuing*. It was found that, in drawing the bond, the scrivener had inserted the words "next ensuing" by mistake, and that the parties meant that it should be paid upon the 24th of May *in the year next ensuing*. The court unanimously agreed that this was not usury, for there was no corrupt agreement between the parties, and the act of a stranger shall not bring the lender within the danger of the statute, especially as it was found that he did not require his pay-

ment until after the year. But Lea, Chief Justice, said, if he had sought, by reason of the mistake, to have taken advantage of the forfeiture for non-payment upon the next day, peradventure, it would have discovered a corrupt intention in him, and that he knew of that misprision at the beginning and would take advantage thereof, and this should bring him within the statute of usury. But as it was found, it was clear that it was not usury (*Buckley v. Guildbank*, *Cro. Jac.*, 678; *S. C.*, 2 *Roll. R.*, 414).

In another ancient case one Nevison brought debt upon a bond of £100 for the payment of £54 half a year afterward. The defendant pleaded that there was a corrupt agreement between them for the loan of £50 for half a year and £4 for interest, upon which the said bond was given. The plaintiff replied that it was agreed between them that the £50 should be paid a year afterward, and that the £4 was taken for the interest of a *whole year*; and that one J. S., made the bond, but being illiterate, mistook, and made it, as it appeared. Upon demurrer, Jones, Croke and Berkeley were of opinion that the plaintiff should have judgment, and that if there was no corrupt agreement the bond was good (*Nevison v. Whitby*, *Cro. Car.*, 501; and *vide Ballard v. Oddey*, 2 *Mod. R.*, 307).

In still another early case it was agreed that the plaintiff should lend £50 to the defendant and that the defendant should pay for the forbearance thereof according to the rate of five per cent and no more. J. S., a scrivener, had £50 of the plaintiff in his hands, and it was agreed between the plaintiff and the defendant that the said scrivener should pay the £50 to the defendant and take a lawful bond, with condition to pay interest according to the rate of five per cent. The scrivener paid the defendant the £50, and in the absence and without the notice of the plaintiff took a bond for the payment of usurious interest, and it was insisted that as the plaintiff had accepted the bond, it was to be presumed that he knew how it was when he accepted it. But the court said it was the same case with *Nevison v. Whitby* (*Cro. Car.*, 501), and that, although the plaintiff had notice how it was when the action was brought, yet that did not make him a party to the corrupt agreement, and, accordingly, they gave judgment for the plaintiff (*Bush v. Buckingham*, 2 *Ventr. R.*, 83); and it seems that this case was

recognized at the same term of the court and confirmed (*Buckler v. Millard*, 2 *Ventr. R.*, 108).

So, in still another early case, it was held that if a scrivener, in making a mortgage, through mistake made the money payable sooner than it ought to be, or reserve more interest than ought to be, that would not make it void within the statute, because there was no corrupt agreement (*Anonymous*, 1 *Freem. R.*, 253). And in a subsequent case the same point was formally decided and the doctrine fully sustained (*Booth v. Cooke*, 1 *Freem. R.*, 264; and *vide Murray v. Harding*, 3 *Wil. R.*, 390).

In a later, though quite early, case at *nisi prius*, it appeared that in July, 1807, Haywood and Fraser, joint proprietors of a West Indian estate, by their joint and several bond, executed in St. Kitts, became bound to the plaintiff in the penal sum of £12,000, conditioned to pay £6,000 with six per cent interest. In October, 1806, all the parties being in England, the plaintiff became pressing for payment, and it was agreed between them that the principal should be paid by two bills of exchange—the one at twelve months after date, the other at two years. Accordingly a bill was drawn for £3,180 and another for £3,360, after which the bond was canceled. But, including interest for the different periods the bills had to run at the legal rate of five per cent, they ought only to have been for £3,150 and £3,300. On an action being brought upon the first bill and the defense of usury being interposed, the plaintiff's agent testified that this arose from no corrupt contract, but entirely from a mistake of his own; that after calculating the interest due on the bond at six per cent, as permitted in the West Indies, he had calculated the interest upon the bills, which was to grow due in England, upon the same principle. Lord Chief Justice Mansfield held that the action might clearly be maintained for the sum actually due (*Glasfurd v. Laing*, 1 *Camp. R.*, 149).

The foregoing cases are all early in English jurisprudence, and go upon the principle that the *corrupt agreement* is the essence of the offense of usury, and that a party may, therefore, show what that agreement was, and that it has not been correctly expressed in the written contract. The principle has always been recognized in England, and the same is also equally true of the courts in this country. All of the authorities upon the subject, both, in England

and America, ancient and modern, speak a language too uniform and plain to be mistaken. In order to avoid a contract for usury the agreement must be corrupt. If neither party contemplated usury and the same arises simply from an honest mistake of fact, the transaction can never be usurious. Indeed, it has been declared by very respectable judicial authority in this country that there can be no usury without the concurrence of both parties.

In an early case in the State of Connecticut, it appeared that more than lawful interest was reserved, with the knowledge of the lender, but without the knowledge of the borrower. This was a glaring case on the point, but the court held that the transaction was not usurious. In the opinion of the court, it was said: "A corrupt agreement is essential to constitute usury; and to form a corrupt agreement, as in all other contracts, the minds of the parties must meet. The assent of Beach (the defendant) was, therefore, as essential to the existence of a usurious agreement as that of Bird (the plaintiff's testator). From these premises it follows, as an undeniable consequence, that there could be no corrupt agreement while either of the parties remained ignorant of the excessive reservation; and the jury ought to have been so instructed." It was argued by counsel that it was enough that the lender voluntarily made a usurious reservation; and of the fact that he did so there was no dispute; but that construction of the law was denied by the court; and it was held that the ignorance of the borrower precluded the possibility of an agreement, and hence that there could be no usury in the transaction (*Smith v. Beach*, 3 *Day's Cas.*, 26).

In 1824, the question came before the old Supreme Court of the State of New York, and it was held that taking beyond the legal interest by mistake is not usurious; that is to say, where the mistake is one of fact and not of law. On the 30th of August, 1817, Ogden and Harrison owed the New York Firemen Insurance Company several debts, and one Butler owed another, for which several debts the company took a note of Butler, made by Peters and Harrison, payable at four months from said 30th August. The debts were all due for premiums of insurance. The company made a calculation upon the note, deducting \$23.92 interest for the four months, at seven per cent, then deducted the debts and paid the balance, which was twenty dollars, to Butler.

When this note became due, the makers offered a new note in renewal, also at four months, which the company took, deducting as before \$23.92 for the interest, and giving their check to the makers for the balance, and the old note was taken up. The second note was renewed in like manner for the makers from four months to four months, till January 11th, 1819, when the note in question was given. The discount taken was the fraction of a cent more than the interest would amount to for four months, including the three days of grace. The defense set up was usury; and a verdict was taken for the plaintiff for the full amount of the note, subject to the opinion of the Supreme Court upon a case showing these facts. The case was fully and ably argued on both sides, and a judgment was ordered for the plaintiff on the verdict. The court held that the company had a right to continue a debt originally lawful in the manner this was done; that the last note was therefore valid; and that it was not usurious, though the interest was taken in advance, with such a trifle beyond the interest, on the ground that the excess would be presumed to have been taken by mistake, and not by the adoption of an erroneous rule of calculation, until the latter was shown.

Sutherland, J., in his opinion said: "The note in this case was payable in *four months*. The question which was discussed in the case of these plaintiffs against Ely and Parsons, as to the principle upon which the interest ought to be calculated, cannot arise here, except in relation to the days of grace; and there being no evidence in the case to show upon what principle the interest was calculated, even if there should appear to be a trifling excess, we are authorized, and I think bound, to presume that the error was the result of mistake, and not the adoption of an erroneous principle of calculation" (*New York Firemen Insurance Company v. Sturges*, 2 Cow. R., 664, 677; and *vide Archibald v. Thomas*, 3 ib., 284; *Kent v. Walton*, 7 Wend. R., 256). The next case upon the subject, in chronological order, in the State of New York, was in the late Court of Chancery of the State. It was a motion to dissolve an injunction issued upon a bill filed to cancel a mortgage on the ground of usury. The bill charged that a part of the consideration of the mortgage was a usurious negotiable note given by the complainant to one Ells, and indorsed by the latter to the defendant. The defendant denied that he had any notice of the alleged usury in the note; and insisted that he

was a *bona fide* holder of the note for a valuable consideration; that he subsequently got it discounted at the bank, and the note not being paid when it became due, Ells and himself were duly charged as indorsers; together with another indorser whose indorsement Ells had procured previous to the sale of the note to the complainant. The chancellor decided, that to render a contract usurious, both parties must be cognizant of the facts which constitute usury; and that if a *bona fide* holder of a negotiable note, which was tainted with usury in the hands of the payee, receives from the maker a new security for the debt and gives up the note without any knowledge of the usury, the security which he takes in lieu of it is not usurious; thereby affirming the doctrine laid down in the case in Connecticut hereinbefore referred to. The chancellor, in giving his opinion, said: "If the statement in the answer is true, and it must be taken to be so upon this application, this mortgage is not usurious, although the money secured by it includes the usurious premium which was originally embraced in the note to Ells. To render a contract usurious, both parties to the contract must be cognizant of the facts which constitute the loan. And if a *bona fide* holder of a negotiable note, which was tainted with usury in the hands of the original payee, receives from the maker a new security for the debt, and gives up the note, without any knowledge of the usury, the security which he takes in lieu of it is not usurious (*Cuthbert v. Haley*, 8 T. R., 390). It is true the defendant could not have recovered against the maker of the note in this case upon the original contract, which was void even in the hands of a *bona fide* holder" (*Aldrich v. Reynolds*, 1 Barb. Ch. R., 43, 44).

The Court of Appeals of the State of New York have held that the taking or reserving of more than the legal amount of interest, through an error in computation, does not constitute usury. The action was upon a promissory note, and the defendant alleged that it was void for usury. The evidence showed that the note was given to take up a previous note, principal and interest, and that by some error in the calculation the interest was made to amount to \$95.80, whereas the true amount would have been \$94.01; so that the note in suit was made for \$1.79 more than it ought to have been. This was the usury complained of; but the court at the circuit decided that it was not usury, and directed a verdict for the plaintiff, to which the defendant excepted. The judgment

was affirmed by the Supreme Court at a General Term, and the defendant appealed to the Court of Appeals, where the judgment of the General Term was also affirmed.

Denio, J., in his opinion, said: "The error in calculation, by which an excess of less than two dollars was included in one of the notes, does not make the contract usurious. To constitute usury, there must be an illegal agreement, and this cannot be predicated of a case in which the excess was the result of accident or inadvertence, without any knowledge that more than seven per cent was incurred by the contract. This has been repeatedly decided." And Crippen, J., said: "A mistake in the computation of the interest will not make the loan usurious. The mistake, in this case, is shown by the testimony of Mr. Gould to have arisen from inadvertence, and not from design. In order to establish usury, a corrupt agreement must be shown to exist. No such agreement was made out by the testimony in this case. My conclusion is that the judgment should be affirmed" (*Marvine v. Hymers*, 12 N. Y. R., 223, 231, 236).

In the State of Massachusetts, a case has been decided recognizing the same general doctrine. The action was brought against an executor to recover the statute penalty for receiving usurious interest reserved in a security given to the testator, and paid by the party to the executor without objection or notice to him that usury was reserved in the original contract. The Superior Court, at the trial, held that on the facts alleged the action would not lie, and directed a verdict for the defendant. The plaintiffs alleged exceptions, which, by the Supreme Judicial Court, were overruled. Chapman, in his opinion, said: "It appears that the plaintiff had given to the testator a note, in which unlawful interest was reserved. The note was secured by mortgage, and the defendant as executor brought an action for foreclosure. Whereupon the plaintiff paid the note, including the usurious interest, without giving the defendant any notice that there was such interest reserved, and the defendant received it without knowledge of the fact. * * * The money paid to the executor has gone to the estate, while he must pay, *de bonis propriis*, the amount of the judgment recovered against him. He will pay it as a penalty for having violated the usury laws. In favor of an innocent person, the greatest strictness ought to be held; otherwise the law would enable the plaintiff unjustly to ensnare him. It may be further remarked

that, in the times when usury was regarded as a much graver offense than it now is, a usurious intent was necessary to be averred and proved in order to make a party liable to the penalty (*N. Y. Firemen's Ins. Co. v. Ely*, 2 Cow., 678; *Archibald v. Thomas*, 3 Cow., 289). And such an intent is negatived in the present case" (*Heath v. Cook*, 7 Allen's R., 59, 60).

In an early case in the State of Virginia, the court held that the mistake of a scrivener in putting one sum for another will not make the transaction usurious, for the reason that in such a case there is an absence of the *intention* to take more than legal interest, which intention is requisite in order to constitute usury. In the same case, however, it was held that if a mode of calculating interest, which gives the creditor more than legal interest, is adopted, and the creditor knows it will have that effect, he is guilty of usury, although he may not suspect that he is violating the law (*Childers v. Deane*, 4 Rand. R., 406).

And in the State of Maryland, an action was brought upon a single bill, to which the defense of usury was interposed. It appeared in evidence that the bill was given upon a settlement of an account between the parties, which contained items of debt and interest; and in two of the items the interest, as it was calculated, exceeded the legal rate. The receipt of the bill at the foot of the account stated that in case of error either way, should any be discovered, it should be corrected. On these facts the court very properly held that there was no usury, or that the statement of itself was no evidence of usury (*Stockner v. Ethnall*, 3 Gill and Johns. R., 123).

So, also, in the State of New Hampshire, the court has held that more than legal interest, reserved or received through a mistake in calculation, when there was no intention of departure from the legal rate, is not usurious. Richardson, C. J., gave the opinion of the court, and said: "It seems that there was some mistake in the calculation of interest; for the sum mentioned in this note amounts to more than would have been due upon the first note, casting the interest at twelve per cent, and whatever may have been included by mistake cannot be deemed usurious" (*Gibson v. Stevens*, 3 N. H. R., 185, 187).

The Supreme Court of Ohio, a long time ago, held that an error in calculation, an accidental omission of a credit, or a transfer by mistake of an item from one account to another, will not make a

security usurious and void, there being no intent to exact or take unlawful interest (*Busby v. Finn*, 1 *Ohio State R.*, 409).

In the State of Wisconsin, the Supreme Court has held, in accordance with the general rule, that, to avoid a contract on the ground of usury, it must appear that the lender knew the facts, and acted with a view to evading the law. An action was brought to foreclose a mortgage given to secure the payment of a note for \$1,000, with interest at twelve per cent. The mortgage and note were assigned to the plaintiff after they became due. It appeared that the agent of the borrower procured the loan for him at the highest rate of interest, and retained three per cent in his own hands, stating to the borrower, his principal, that the three per cent had been deducted by the lender. The defense was usury. The Circuit Court held that the transaction was not usurious, and the defendant appealed to the Supreme Court, where the judgment was affirmed. Dixon, C. J., delivered the opinion of the court, and said: "Usury is a matter of intention, and, to avoid a contract on that ground, it must appear that the lender knew the facts, and acted with a view of evading the law (*Otto v. Durege*, 14 *Wis.*, 574, and cases cited). There is no evidence that Merrill knew anything about the deduction of the three per cent by Fay, or ever agreed to it. The contract was, therefore, valid in the hands of Merrill; and, being valid in his hands, it is also valid in the hands of his assignee, Fay. Fay acted as the agent of Lovejoy in procuring the loan, retained the three per cent in his own hands, and then wrote Lovejoy that it had been deducted by Merrill. This was a deception on the part of Fay, for which Lovejoy might have been allowed in this action the sum detained, with interest, if the facts had been stated in his answer; but it did not make the contract with Merrill usurious" (*Fay v. Lovejoy*, 20 *Wis. R.*, 407). The case in the 14th of Wisconsin was this: A., for the purpose of raising money, made his note payable to the order of B., drawing the highest rate of interest allowed by law, and requested B. to sell it for him, and B. sold it at a *discount* to C., who "had no knowledge of the origin of the note," and paid the proceeds to A. The maker brought his action to have the note declared void for usury, and the Circuit Court gave judgment for the plaintiff, holding that the note was usurious. The defendant appealed to the Supreme Court, where the judgment of the Circuit Court was reversed; the Supreme Court holding that the note was not usu-

rious. The court held, however, that if the purchaser of the note had known the character of the paper, or if the transaction had been attended with circumstances which should reasonably have aroused his suspicions and put him upon inquiry, the question would have been different. Dixon, C. J., in his opinion, said: "In such cases the law looks behind the shifts and devices of the parties, and, according to the fact, declares the transaction to be a *loan*, and not a *sale*. But, in order to do this, it must appear that the supposed purchaser had notice, either actual or derivable from the circumstances of the case, of the trick or device resorted to, and, therefore, consented to it; otherwise he will not be divested of the character and rights of a purchaser. For usury is a matter of intention; and, to render a contract usurious, both parties must be cognizant of the facts constituting the usury, and have a common purpose of evading the law. * * * And the intention on the part of the maker and seller of the note to commit usury will not, unless communicated or known to the party intending to make the purchase, supply the want of such intention on his part, or change his relation to the transaction" (*Otto v. Durege*, 14 *Wis. R.*, 571, 574).

And the Supreme Court of the State of Florida has held that usury cannot result from the act and intention of one of the parties to the contract alone; that both parties must concur in the same design (*Hayward v. Le Baron*, 4 *Fla. R.*, 404).

And here it may be affirmed that the *intent* of the parties in those cases is always a question for the jury, and their finding upon the subject, if sustained by evidence, is final and conclusive. In a very late case before the Supreme Court of the State of New York, it was held that where, in an action upon a promissory note, the single question to be tried is, whether there was a corrupt and usurious agreement made upon a loan of money, which was the consideration of the note, the *intent* of the parties is a question of fact; and when that question is found against the defendants upon conflicting evidence, their finding is conclusive, unless some error was committed on the trial by the judge in his findings or charge to the jury. Potter, J., in his opinion, said: "The intent of the parties was a question of fact, and this question was found by the jury against the defendants. Upon the defendants' theory, and upon their testimony alone, a jury might have found in their favor. And so it may be said, also, that upon the plaintiff's theory and

testimony alone it was a clear case of his right to recover. The jury, having both theories and all the facts before them, have settled all the case, unless the judge mistook the law at the trial. *

* * I have examined with some care the rulings of the court on the trial, and have found none of which the defendants can complain." Miller, P. J., in his opinion, said: "The case looks very much like usury; but I am inclined to think it was a question for the jury whether the arrangement with the bank was for the purpose of evading the usury laws, and concur in the result" (*Horton v. Moot*, 60 *Barb. R.*, 27, 28, 30).

Where the alleged usurious interest was actually and in good faith given and received as a gratuity or gift, the transaction will not be declared usurious. Usury consists in the taking or receiving a greater sum or value for the loan or forbearance of money, etc., than is prescribed by law; and contracts and securities can only be void for usury when there is reserved or taken, or secured or agreed to be taken, any greater sum for the loan or forbearance of money, etc., than is prescribed by statute. It is obvious, therefore, that when the excess over legal interest is given as a present, and not as a consideration for the forbearance of money or other thing, there can be no usury. This has been decided by high judicial authority.

In a recent case in the present Supreme Court of the State of New York, the rule was plainly declared. An action was brought to foreclose a mortgage to secure the payment of \$21,537, with semi-annual interest, executed by the defendant to the plaintiff. The defense interposed was usury, in that \$5,000 was included in the mortgage as a consideration for extending the time of credit for the ten years the mortgage was made to run. The action was tried by a referee, who found that the time was given without any consideration, and that the \$5,000 was inserted in the mortgage by the defendant without the knowledge of the plaintiff, and as a gift voluntarily made by the defendant. The referee, therefore, found the mortgage to be a valid security for the amount actually loaned, and gave judgment accordingly. The defendant appealed from the judgment entered upon the report of the referee to the General Term of the Supreme Court, and the judgment of the referee was affirmed.

Allen, J., in his opinion, said: "The giving of a sum of money by the debtor to the creditor, or the including of an amount, in

addition to the actual indebtedness, in a security given for the real debt, as a gift, will not bring the security within the statute of usury. It is true, in most cases it would be a suspicious circumstance, and it would devolve on the court, before upholding the security, to be satisfied that such was the real nature of the transaction; that the nominal gift was not in reality a compensation for the forbearance, and so colorable and a shift to evade the statute. But where it is clearly established that it is in truth a gift, voluntarily made, having no connection with the time given for the payment of the debt, the security will be valid, no matter what may have been the moving cause of the gift with the donor. If the donee or creditor be innocent of any intent to exact or receive more than the legal rate of interest, his security will be valid" (*Woodruff v. Hurson*, 32 *Barb. R.*, 557, 560).

And the doctrine has been illustrated by a stronger case, before the Supreme Court of the State of Iowa. The sum of seventy-five dollars was included in a note as a compensation to the party for waiting for his pay up to the time of the date of the note, without any request of the payee; and it was found that there was no intention to contract for usury. The court held that the note was not usurious, under the circumstances shown, but was valid and binding for the whole amount.

Wright, J., delivered the opinion of the court, and said: "The interest, at seven per cent, for the time he had been kept out of his money, would have amounted to more than half the seventy-five dollars; and really, no one would say that the additional thirty dollars was an unreasonable compensation for his delay; and finally, when it was put in at the maker's instance, and not as the result of any contract to pay so much interest, it would be almost impossible to conceive of a case where there was a more complete absence of a corrupt agreement" (*Jones v. Berryhill*, 25 *Iowa R.*, 289).

Perhaps reference may as well be made here as anywhere to some cases settling the rule in respect to contracts for compound interest; that is, the adding of the growing interest of any sum to the sum itself, and then the taking of interest upon this accumulation; and to cases in which the transactions have been held not to be usurious. Sometimes the practice is regulated and sanctioned by statute, and in other cases it is settled by the courts. At an early day in the history of English jurisprudence, such contracts

were considered illegal, and within the statute of usury; and courts of equity in this country have held to the same rule. That is to say, they have held that compound interest is not forbidden by the statute against usury, but that it is iniquitous and will not be allowed, though it was agreed to by the parties. Indeed, it is doubtless settled in England, and in most of the United States, that this excess of interest cannot be collected by law, unless upon an agreement to pay it, made after the day of payment has passed. But it is equally clear, from the authorities, that if it be paid *voluntarily* it is not usury.

In an early case in the English High Court of Chancery, where upon a petition to be admitted to prove under a commission of bankruptcy that in settling accounts half-yearly interest had been turned into principal, and on the other side it was contended that, admitting an antecedent contract for compound interest to be illegal, parties might settle accounts, even half-yearly, upon that principle, Lord Eldon, chancellor, said: "As to the question of compound interest, it is clear we cannot, *a priori*, agree to let a man have money for twelve months, settling the balance at the end of six months, and that the interest shall carry interest for the subsequent six months; that is, you cannot contract for more than five *per cent*, agreeing to forbear six months; but, if you agree to settle accounts at the end of six months, that not being part of the prior contract, and then stipulate that you will forbear for six months upon these terms, that is legal. So this is legal between merchants, where there is no agreement to lend to either, but they stipulate for mutual transactions, each making advances; and that if, at the end of six months, the balance is with A., he will lend to B. and *vice versa*. That sort of transaction has taken place, I admit, generally. That cannot be applied to the case of a real security; and you may not, when the debt comes to a certain sum, take a real security and fair *per cent*. I do not know if that will do in a mercantile transaction. It is not enough to say, in this case, that their accounts have been settled from half year to half year, and, therefore, it is legal to take interest in this way, for the transactions may be evidence of previous agreements" (*Ex parte Bevan*, 9 Ves., Jr., R., 233). So, where the defendants were sued by their bankers for a balance of an account, and it appeared that every quarter the bankers struck a balance, in which were included the principal sum of money advanced, all interest due upon it and a

commission of five shillings for every £100 advanced, which balance at the end of the quarter having been handed to the defendants was converted into principal and made to convey interest, the Court of Exchequer declared themselves strongly of the opinion that this case was not usurious, but that the striking of a balance every quarter brought it to a fresh agreement at the beginning of each quarter to lend the sum due (*Caliot v. Walker*, 2 *Austr. R.*, 495).

And in another case in the Exchequer Chamber in Error it was held that a memorandum indorsed on a bond which was conditioned for the payment of £100 by quarterly payments of £5 each and interest at £5 per cent; "that at the end of each year the year's interest due was to be added to the principal, and then the £20 received in the course of the year was to be deducted and the balance to remain as principal, and so continue, yearly, till both principal and interest were fully paid," was not usurious. Lord Chief Justice Eyre said: "The court must strain the words of the contract in order to make it usurious. It was not the interest on £100, but the interest *due*, that was to be added to the principal at the end of the year, and the interest due could only be taken to mean what was legally due" (*Hamilton v. Le Grange*, 2 *H. Black. R.*, 144, 145).

In the old Supreme Court of the State of New York an action of assumpsit was brought on four promissory notes, given on settlement of accounts, made as follows: On the 22d November, 1819, the defendant was charged with a bill of goods amounting to \$2,211.49, and after charging interest and deducting some items of credit, a balance was struck on the 5th February, 1821, of \$2,217.31, the interest of which sum was then charged up to the 5th February, 1822, and added to the principal, making \$2,374.64; on which last sum, composed of principal and interest, interest was charged for one year seven months and thirteen days, up to the 18th September, 1823, the date of the notes, and added to the last sum, making, together, \$2,643.85, for which the notes declared on were given. The defendant insisted that the notes were usurious, and the judge at the Circuit so held, and, thereupon, nonsuited the plaintiff. The plaintiff then made a motion in the Supreme Court to set aside the nonsuit, which was granted and a new trial ordered, the court holding that a note given on the settlement of an account, in which compound interest is charged, is not usurious.

Sutherland, J., gave the opinion of the court and said: "Compound interest has nothing to do with the question of usury. It is illegal upon a different principle. Interest, annually compounded and added to the principal, does not give the creditor more than seven per cent per annum for his money; and unless a rate of interest greater than that be taken, there is no usury. * * * Interest is justly and equitably due at the end of each year, if payable annually; and if the debtor, instead of paying it, gives his note or bond for it, there is no legal objection to enforcing its payment. If the interest is carried into an account-current, and the debtor gives his note for the balance of the account, it stands in principle upon the same footing" (*Kellogg v. Hickok*, 1 *Wend. R.*, 521, 522). This case has been expressly recognized as authority by the present Supreme Court of the State, in which it was held that an agreement to pay interest upon interest, due at the time the promise is made, is not usurious and may be enforced.

Sill, J., who gave the opinion of the court, said: "The objection that the note is usurious is not tenable. One witness says that \$100 of it is made up of interest upon interest. This does not constitute usury" (*Tyler v. Yates*, 3 *Barb. R.*, 222, 225).

The courts of North Carolina, at an early day, decided that, as a general rule, interest on interest is not allowable; but that, when the sum is ascertained, and the annual payment forms a part of it, and it is so specific that the debt may be sustained, and interest is reserved by way of damages for the detention, it ought to be allowed (*Kennon v. Dicken*, *Cam. & Norw. R.*, 357).

So, without multiplying words, or referring to numerous cases, it seems to be well settled that, although compound interest will never be allowed, except in special cases, and the agreement therefor may never be enforced, yet a contract which includes a stipulation to pay it will not be, for that reason simply, usurious, so as to render the contract, in other respects than the agreement to pay the compound interest, illegal and void at law (*Vide Connecticut v. Jackson*, 1 *Johns. Ch. R.*, 14; *Mowry v. Bishop*, 5 *Paige's R.*, 98).

In this connection, reference may also be made to the settled rule in respect to contracts in which it is stipulated that the interest shall be paid semi-annually, quarterly, and the like. And here it may be said that, *strictly*, it is clear that if the lender of a sum of money, payable with interest for forbearance during a cer-

tain term, receive all or any part of the interest during that term, he will thereby have taken interest above the statutable rate. Whether such a transaction was usurious or not, was a question about which the early English authorities did not agree; although it seems that a majority of opinions was favorable to the validity of such an arrangement. But, however the ancient authorities differ upon the subject, the law now is well settled that such contracts are perfectly valid.

In a case in the late Court of Chancery of the State of New York, it was held that a note payable one year from date, with interest quarterly, was not usurious (*Mowry v. Bishop*, 5 *Paige's R.*, 98). And the question is set at rest by a recent decision of the Supreme Court of the United States, which holds that, where a statute fixes the rate of interest per annum, a contract may lawfully be made for the payment of that rate before the principal comes due, at periods shorter than a year. The action was upon a bond of the city of Muscatine, in which the interest was made payable semi-annually at ten per cent; and by statute the city had no power to issue its bonds agreeing to pay interest at a greater rate than ten per cent per annum. It was insisted, among other things, that the bond was not valid, because, in the stipulation to pay the interest semi-annually, at the rate of ten per cent, the authority conferred by the vote which limited the rate of interest to "not higher than ten per cent per annum," was transcended, and a usurious rate agreed to be paid. Mr. Justice Swayne delivered the opinion of the court, and disposed of this position of the defendant in a very few words. He said: "This objection has no foundation. When a statute fixes the rate of interest per annum, it has always been held that parties may lawfully contract for the payment of that rate, before the principal debt becomes due, at periods shorter than a year" (*Meyer v. The City of Muscatine*, 1 *Wall. R.*, 384, 391). This authority is decisive upon the subject, and further citations need not be made. The rule is well settled, and uniformly recognized in all of the States.

CHAPTER XVIII.

TRANSACTIONS NOT USURIOUS — LOAN OF CHATTELS.

It has been held by the New York Court of Appeals, as was stated in a previous chapter, that the statute prohibiting a greater rate of interest than a specified per cent per annum "for the loan or forbearance of any money, goods or things in action," is applicable only to those loans which are in substance and effect loans of money. The true construction of such a statute is held to be that no more than the prescribed rate of interest should be taken on a loan or forbearance of money, *directly or indirectly*, by way of loan of goods or choses in action, or in any other manner. In a word, it is held that the words "goods and things in action" do not change the true intent and meaning of the statute in the least, and that the statute would be as comprehensive without the specification of those words as it is with those words contained in it. It is declared that the terms "interest" and "forbearance" cannot be predicated of any other than a loan of money, actual or presumed. The meaning is, that interest is a *certain profit* for the use of the loan; and forbearance, the giving a further day, when the time originally limited for the return of the loan has passed. That both interest and forbearance imply that the thing loaned has an established value, so that the lender on its return, with the compensation fixed by law for the use and risk, may receive a "certain profit." And it is argued that this is true only of money, which is legally supposed to have a fixed, unchangeable value in itself, and to be consequently the true medium of the value of all other property. A fixed rate per cent in money, therefore, in contemplation of law, is supposed to give to the lender a "certain profit," because the thing loaned is of the same value at the end of the term as at its commencement. This, it is said, is not true in fact, even of money, and the law does not affirm it to be true of anything else. From this reasoning it is very properly concluded that a loan of goods is not within the statute, whatever may be reserved for their use.

If this conclusion be correct, it follows, as a matter of course, that there can be no usury in a loan of chattels, whatever may be the per centage upon their value agreed to be paid for their use,

unless such loan is intended as an indirect loan of money. And this is the doctrine of the authorities. A strong case illustrating the rule was early decided by the New York Court of Appeals.

An action of assumpsit was commenced, in 1842, by one Bell against a man by the name of Rice, in the Recorder's Court of the city of Buffalo, to recover the amount of a promissory note given by the defendant to the plaintiff for \$337, on the 22d of June, 1841, payable one day after date. The defendant set up as a defense that the note had its origin in a corrupt and usurious agreement. On the trial it appeared that the note was given in payment of a balance due upon the following transaction: Bell loaned to Rice, on the 1st day of May, 1834, eleven cows, for two or four years, as Rice might elect, Rice to pay \$50.75 on the 1st of May in each year for their use. Rice agreed to return the cows to Bell with calf or with calves by their sides, on the 1st of May, 1836 or 1838, as he should elect, worth \$203, or pay that amount in cash. Bell was to sustain all losses that should appear providential. The contract to this effect was in writing. The defendant's counsel, among other things, asked the court to decide that the agreement was *per se* usurious, the hazard or contingency being such as not to take the agreement out of the statute. The court refused, and decided that the question whether the agreement was a fair and honest one, in consideration of such hazard, should be left, and was left, to the jury. The defendant's counsel excepted. The jury found a verdict in favor of the plaintiff for the amount of the note and interest, and judgment was entered in accordance with the verdict. The case was then carried to the Supreme Court on a bill of exceptions, where the judgment of the Recorder's Court was reversed and a new trial ordered. From that decision the plaintiff appealed to the Court of Appeals, where the judgment of the Supreme Court was reversed, and that of the Recorder's Court affirmed.

Gardner, J., delivered the opinion of the court and said: "According to the contract, as stated in the bill of exceptions, the parties had in view a loan of cattle, with liberty to the borrower to convert the loan into a sale, at the time and upon the terms prescribed in the agreement.

During the continuance of the loan and until the defendant made his election, he was to pay a stipulated sum exceeding seven per cent for the use of the property, which was to remain at the

risk of the lenders for the time specified, as to all accident, not arising from the negligence or misconduct of the former.

This, I apprehend, is the meaning of that clause in the contract by which the plaintiff "was to sustain all losses that shall appear to be providential." The agreement, in a word, contemplated a loan of chattels; and whether the compensation fixed by the agreement did or did not exceed seven per cent per annum upon their value was immaterial, as the subject of the loan was not within the statute in relation to usury. * * * Such loans may be resorted to as a cover for usury, and so may a contract for the sale of lands. And it is believed that the apparent confusion in some of the cases has arisen from not discriminating between a loan of chattels and evidence *tending* to prove such a contract, in form, a mere cloak for an usurious loan. * * * Without considering the other questions presented, upon the ground that this was a loan in fact as well as in form, the subject of which is not within the provisions of the statute against usury, the judgment of the Supreme Court must be reversed, and that of the Recorder's Court affirmed" (*Bell v. Rice*, 5 *N. Y. R.*, 315, 317, 319).

The same doctrine has been repeatedly sanctioned and acted upon by the old Supreme Court of the State of New York.

To take the cases in chronological order, the first to which reference is made was an action of assumpsit upon a written contract made by the defendants in these words: "April 15th, 1819. For value received, we promise to pay and deliver to John Spencer, or bearer, \$360, or twelve good middling cows, and twelve good calves which come by said cows above mentioned, to be paid and delivered at the dwelling house of said Spencer now is in, four years from the date, in Verona; said cows not to exceed eight years old, nor under four years old. As witness our hand." The defense was usury; and the evidence to sustain the defense was, that the plaintiff, a few days before the date of the agreement, agreed with the defendants to let them have six cows for four years; and that the defendants, at the end of the term, should return him twelve cows with calf, or with calves by their sides, or pay him thirty dollars each for the six cows. The plaintiff admitted it was more than the cows were worth; but said he would put them at that sum so as to be sure and have the cows again. He said, at the same time, that his bargain was as good as twenty-five per cent interest. On the day the contract was executed, the

plaintiff reiterated substantially the same thing. The defendants also proved that the cows were not worth more than nineteen dollars each; in the whole, \$114. The defendants also proved, under an objection, that twelve good middling cows, with calves by their sides, would, on the 15th April, 1823, have been worth \$204.

The plaintiff proved that, at the date of the contract, cows were worth about one-fifth more than in 1823; and that the usual practice of letting cows was to double in four years; the party letting usually taking part of all risk of accidents. The defendants objected to the proof of usage, but the objection was overruled.

The judge at the circuit then said: That if it was agreed, or intended by the parties, that the plaintiff should receive above seven per cent interest, the note would be void for usury; and he should consider that as a question of fact for the jury to decide. He held, however, if the plaintiff was entitled to recover at all, the \$360 was to be considered in the nature of a penalty; and the plaintiff could not recover above the twelve cows and calves when they became due, with interest to the *quarto die post*, being \$208; and therefore a verdict for that sum was taken for the plaintiff, subject to the opinion of the court on the case as presented, and under an agreement that the court should give judgment, or set aside or modify the verdict, according as they should hold the law to be. The case was very ably argued in the Supreme Court, and it was there held that the verdict was right.

Savage, Ch. J., delivered the opinion of the court, and said: "The contract was not usurious; though the plaintiff was a very hard and unconscionable creditor. The interest and principal were both put at hazard to a considerable extent. It was uncertain, in 1819, what would be the value of the cows in 1823. If the hazard be slight, and merely colorable, it will not take the case out of the statute; but I do not consider it so in this case. Here was no negotiation for a loan of money. It was a bargain by which the plaintiff was pretty certain of making a handsome profit; but by which he might lose.

I think the \$360 in the contract must be considered as a penalty. The verdict is, therefore, right, and the plaintiff entitled to judgment for the \$208" (*Spencer v. Tilden*, 5 Cow. R., 144, 148-150).

The Supreme Court had, at a previous term, made a similar decision in a case which is reported in a note to the case of *Spencer*

v. *Tilden*. The case was a certiorari to a justices' court. Wetmore sued Holmes in the court below on the following agreement:

"Whitestown, August 26th, 1819. Ebenezer Holmes received of Ezra Wetmore ten ewe sheep, for which I promise to deliver twenty sheep of as good quality, three years from date.

"EBENEZER HOLMES."

Plea, the general issue. On the trial, sheep, in August, 1822, were proved to be worth one dollar per head. The justice gave judgment for the plaintiff for twenty dollars damages and the costs; and his judgment was affirmed (*Holmes v. Wetmore*, 5 Cow. R., 149, note a).

In the case of *Holmes v. Wetmore*, usury was not interposed as a defense, to be sure; and yet from that fact, and from the fact that there is not an intimation that the case might be one tainted by usury, the inference is reasonably fair that the court considered that a *bona fide* letting of sheep, to double in three years, is not usurious.

The next case in order was a writ of error from the Oneida Common Pleas. Williams sued Cummings in a justices' court, and declared on a contract bearing date 12th May, 1824, by which Cummings acknowledged to have received of Williams a two-year old heifer and calf, and agreed within four years, to return the same heifer, and she to be with calf, and also another heifer three years old, also to be with calf; Williams only incurring the risk of the heifer received by Cummings being killed by lightning. The defendant pleaded usury, and a jury by whom the case was tried gave a verdict for the plaintiff for twenty-seven dollars. The defendant appealed to the Common Pleas of Oneida, and on the trial the contract was put in evidence and proof given as to the value of the property.

The defendant moved for a nonsuit, on the ground that the contract was usurious. The motion was denied. The defendant then offered to prove, for the purpose of showing that the contract was usurious, that the heifer received by him was not worth, at the time of the contract, over ten dollars; that cows six years old with calf were worth twice as much as two year old heifers with calf; and that three year old heifers with calf were worth one-third more than two year old heifers with calf. This evidence was rejected by the court, and the defendant excepted. The jury found a verdict

for the plaintiff, with thirty-five dollars damages, on which judgment was entered, and a writ of error sued out. The judgment of the Court of Common Pleas was affirmed by the Supreme Court.

Marcy, J., delivered the opinion of the court, and said: "The facts of this case differ somewhat from those in *Spencer v. Tilden* (5 Cow., 144); but the difference is not so great (viewing it to be a loan, as that was) as to call for the application of a principle of law different from the one which controlled that case. There was, perhaps, more certainty in this case that the property to be returned at the end of four years would be worth that advanced, with the addition of seven per cent per annum to its value, than there was in the case of *Spencer v. Tilden*; but there was a contingency (a remote one, it is true) that the whole might be lost. There is great difficulty in laying down rules as to what shall constitute usury in the loan of specified articles of personal property of fluctuating value. * * * It is very desirable to discourage unconscionable bargains and deprive the extortioners of the anticipated fruits of their unjust and oppressive dealings; but while indulging a solicitude to do this, great caution should be observed to avoid establishing rules of law which may restrict or interrupt the ordinary business intercourse of common life. I do not think we ought to pronounce the contract in this case usurious" (*Cummings v. Williams*, 4 Wend. R., 679, 681).

The next and last reported case in the old Supreme Court of New York upon the subject came up on error from the Washington Common Pleas. Hall let Haggart & Reynolds have fifty merino sheep; in consideration whereof, Haggart & Reynolds agreed to pay to Hall annually fifty cents per head for each sheep, and, on receiving a *year's notice*, return to him the *same number* of sheep, and of the same *quality* and *age*, as nearly so as possible; the contract to continue for such length of time as Hall should choose. Hall brought a suit in a justices' court to recover twenty-five dollars, due at the end of the first year, and obtained judgment. The case was removed into the Washington Common Pleas by appeal, and on the trial in that court the defendants offered to prove that the sheep, severally, were not worth a sum which, at an interest of seven per cent per annum, would produce fifty cents per year, and insisted that such fact, if established, would show the contract to be usurious. This testimony was objected to by the

plaintiff, but the court overruled the objection, and held that it was admissible, and that, if the fact offered to be proved should be established, the contract was usurious and void. The defendants thereupon proved that the value of the sheep was only from *three* to *five* dollars per head. The plaintiff offered to prove that the *wool* alone of the sheep was worth *one dollar* per pound, and that it was the universal custom to let sheep for a pound of wool per head; which evidence was rejected by the court. Whereupon the court nonsuited the plaintiff, and he sued out a writ of error. The Supreme Court reversed the judgment of the Common Pleas, and ordered that a venire *de novo* be issued from the court below; holding that the transaction was not necessarily usurious, as it appeared on the trial in the court below; that the contract was not usurious if it depended upon *contingencies* whether on the return of the property the lender would have received more than the *value of the property* at the time of the making of the contract, and the *interest thereof* at the ordinary rate; and, further, that in suits on contracts of the kind involved in that case, the question whether the contract was a device or shift to evade the statute of usury should be submitted to a jury. Cowen, J., delivered the opinion of the court, and said: "The question presented by this bill of exceptions is by no means free from difficulty. There are several cases which clearly sanction the contract, looking at its face, so far as the mere loan of the sheep is in question. * * * In the case at bar, the sheep were loaned for one year certain, and so from year to year, so long as the lender chose, with a stipulation to return the same number, of the same quality and age, as nearly as possible, on one year's notice. So far there could be no chance of profit, except the rise of value in the market; and there might be considerable loss from the depreciation in value. The direct and certain income lay in the fifty cents per head, which is conceded to have been more than seven per cent on the cash value at the time of the loan. * * * It appears to me that there is a series of cases in point, with regard to like dealings in other property, against this transaction being considered usurious *per se*. * * * No doubt that, in any of the cases decided by this court, had the jury found that the doubling of the cattle or sheep to have been a mere shift for evading the statute, those contracts would have been adjudged void; and a finding of the jury seems to me to be the true way of settling such questions.

The court below held that the giving of fifty cents per annum, under this contract, for sheep worth less than the cash principal of that sum, avoided the contract, independent of all question as to the present value or depreciation. The fall in the market might have led the plaintiff to exercise his right of election unfavorable for the defendants. Whereas, there could be no ground for unreasonable delay, if sheep had continued as valuable as the plaintiff proposed to show they were at the time. Again, they might have suddenly risen in the market, so that the rent should have been more ; and yet, before the year's notice could call them in, have fallen to very little. This whole arrangement may well be regarded, like the case of the final settlement certificates, or the salt, as a mere bargain of hazard, or the jury might well have pronounced it a fraud on the statute, for aught I know. I think their opinion should have been taken." (*Hall v. Haggart*, 17 *Wend. R.*, 280, 282, 284, 285).

In this case, and in the case of *Cummings v. Williams* (4 *Wend. R.*, 680), the lenders, it will be perceived, were to receive the capital loaned, at all events, with more than the legal rate of interest for its use. This would have been usury in a loan of money, beyond question. It would have been usury in a loan of chattels, also, if they were within the statute ; and yet the contracts in both cases were pronounced valid by the Supreme Court ; and the soundness of these decisions was not questioned, but rather sanctioned by the Court of Appeals in the case of *Bell v. Rice*, before referred to.

The principle of the New York cases has been sanctioned in other States. A very strong case is found in the early Connecticut reports. The case was one of a loan of \$16,839 of final certificates, to be repaid in the same kind and amount at six months, and the lender stipulated for the receipt of \$1,000 besides the lawful interest. These certificates were notoriously in a rapid course of depreciation ; and the court sustained the contract, and said : "To bring a contract within the statute, and the mischief it was made to prevent, it must be clearly for the repayment of a greater value than the amount of the loan, with an advance thereon, at the rate of six per centum per annum. That it be a greater quantity, though of the same kind of article, is not sufficient. If the article be of a fluctuating value, and from such change or diminution of its value as from its nature or the course

of trade it is subject to, it may not at the time of repayment be worth more, or so much. A loan of 100 bushels of salt, for example, in the year 1783, when it was at twelve shillings, to repay double the quantity at the end of one year, when it might have been but four shillings, would not come within the statute, be the price what it might at the year's end. Nor would it make a difference if it was to repay 106 bushels of salt and a sum of money besides, provided that both of them might not amount to more than the value of the loan and six per cent interest thereon.

With regard to the final settlement certificates said to be loaned in this case, it is matter of public notoriety that they were, at the time of the contract, in a state of rapid depreciation; and that, having no funds to rest upon for principal or interest; it was wholly uncertain how low they might fall, and whether, at the end of six months they would, if considered as merchandise (as they must be, to bring them at all within the description of the statute), be worth half so much as they were when loaned; in which case, the plaintiff, instead of giving £300 would lose that sum and the defendant gain it. The loss by the depreciation was at the plaintiff's risk. * * * The contract in this case, though in the form of a loan, was really in the nature of a speculation and bargain of hazard. It depended upon a contingency, to wit, that of depreciation, whether all or how much of the principal or value loaned should be repaid, and which of the parties the speculation should ultimately favor, which takes the contract entirely out of the statute."

Dyer and Pitkin, JJ., dissented upon the express words of the statute, which prohibited the loan of other articles as well as money for more than the legal rate of interest; and they denied that, where the principal is to be made good in kind, more than the legal rate of interest could be reserved, under pretense of indemnity for depreciation. A majority of the court, however, held that the contract, though in the form of a loan, was really in the nature of a speculation and bargain of hazard, and, therefore, not subject to the taint of usury (*Hamlin v. Fitch, Kirby's R.*, 260).

In some of the States, as in Massachusetts, while their usury laws were in force, and in Vermont, the statute of usury excepts from its operation the letting of cattle according to the custom among farmers. But it seems, from an early case in Vermont, without

such exception, their courts would feel themselves bound to deny the application of the statute.

Collamer, J., delivered the opinion of the court, and said: "In relation to the letting of cattle, etc., which the provision of our statute permits to be done, agreeable to the usage of farmers, it was decided by this court in the county of Franklin, while Ch. J. Skinner presided, and in a more recent case in the county of Chittenden, that such letting is not usurious, though the risk of the lives of the cattle be on the hirer, and though an unqualified note to deliver a certain number of cattle be taken, if such was the usage. This is not only within the proviso of the statute, but is sustained by the case of *Spencer v. Tilden* (5 Cowen, 144), where it was decided that *selling cows*, etc., on a contract to return double the number at the end of two years, is not usurious; also the same point as to sheep, in *Holmes v. Wetmore*, 5 Cowen, 144, note; (*Whipple v. Powers*, 7 Vt. R., 457).

The same general doctrine was recognized by the Supreme Court of the State of Iowa, in a case involving the validity of an agreement by a purchase of a lot of sheep, to pay therefor a specified sum of money and "two pounds of wool per year for each sheep so sold and delivered for two years," the court held that the agreement was not necessarily usurious, and sustained the transaction (*First National Bank v. Owen*, 23 Iowa R., 185). And the Supreme Court of Florida has held that a contract to pay a bushel and a half of corn within a year in return for one bushel, is not within the statute of usury, owing to uncertainty and fluctuating character and value of the article (*Morrison v. McKinnon*, 12 Fla. R., 552).

It is well settled by the authorities, therefore, that there can be no usury in cases of a sale or loan of chattels, provided the transaction be in good faith, what it purports on its face. The cases all proceed upon the doctrine that the value of everything which can be the subject of a loan, except money, is subject to fluctuation; and consequently that an individual who loans five bushels of wheat to receive ten after harvest, or who loans any other chattel to be returned in kind again, may, at the end of the term, from the depreciation of the commodity, receive in value less than he parted with, interest included, and, consequently, such transactions are excepted from the statute against usury.

CHAPTER XIX.

TRANSACTIONS NOT USURIOUS—MISCELLANEOUS CASES HELD TO BE
FREE FROM THE TAINT OF USURY.

THERE are numerous cases, important in their nature, which have been held by the courts not to be usurious, and which cannot properly be classed under the heads named in any of the preceding chapters, but which, nevertheless, illustrate transactions constantly arising in practice, alleged to be tainted with usury. A separate chapter will, therefore, be devoted to the consideration of these cases, without particular regard to their nature or where they were decided; but they will, nevertheless, be set down in their chronological order.

The first to which reference will be made was decided by the English Court of King's Bench, in 1803. The action was for usury against the acceptor of a bill of exchange drawn on the defendant and payable to the order of the drawee, thirty days after date. The bill was presented to the defendant for acceptance eighteen days before it was due, when it was agreed between the parties that the defendant should then pay the bill upon an allowance of sixpence in the pound, which he said was his usual charge upon such occasions; and he accordingly paid the amount upon those terms to the holder, who thereupon gave up the bill. Subsequently a *qui tam* action was brought for the usury, and these facts appearing at the trial before Lord Ellenborough, C. J., it was objected on behalf of the defendant that this was no *loan* or *forbearance*, as between these parties, which it was laid in the declaration, and which was necessary to constitute usury; that there could be no borrowing unless there was an obligation to repay, which was not the case here; but that the transaction was nothing more than an anticipation of payment, for which accommodation it might be even admitted that the defendant had taken more than an adequate consideration, but that would not constitute usury. His lordship thought the objection well founded, and nonsuited the plaintiff. A motion was made to set aside the nonsuit, when it was argued that if the transaction was not to be considered usurious, on the ground that it was only an anticipation of payment, for which a party was at liberty to take what rate of interest he pleased, it would be very wrong to evade the statute of usury by

framing the securities in this form. But the court, in *banc*, took the same view of the case as the chief justice did at the trial, and the rule for a new trial was refused (*Barclay v. Walmsley*, 4 *East's R.*, 55).

The next case in order to which reference will be made was decided by the old Supreme Court of the State of New York, in 1832. The action was upon a promissory note given for the consideration of a note which was made for the payment of a particular sum, with interest from a day certain to the date thereof, and which was sold to the maker of the note in suit for the face of it, principal, and interest computed from its date to the day of sale. The defense was usury, and it was insisted that the note which was the consideration of the note in suit was usurious on its face; and it was further insisted that the note in suit was usurious, because a *rebate* of interest had not been made on the interest charged on the note taken by the defendant, which had not become due at the time of the transaction between the parties. The judge at the circuit decided that neither of these facts afforded evidence of usury, to which the defendant excepted. The plaintiff obtained a verdict, and the defendant moved the Supreme Court for a new trial, insisting that the decision of the circuit judge was erroneous; but judgment was ordered for the plaintiff.

Savage, Ch. J., delivered the opinion of the court, and said: "The first objection is, that the original notes were usurious upon their face, and, therefore, the present plaintiffs had notice of usury. It is true that the notes promise the payment of interest from a time anterior to the date of the notes, and if the notes were to be considered as evidence of money lent at this date, there would perhaps be more than seven per cent reserved; but it is well known that notes are given for property sold, and upon business transactions, as well as for money lent; usury is a defense which must be strictly proved, and the court will not presume a state of facts to sustain that defense, where the instrument is consistent with correct dealing. * * * Another ground of usury relied on is, that interest was cast upon the notes which had not become payable, and included in the defendants' notes. The answer is that no interest was cast which had not in fact accrued, though it was not payable because the principal was not payable; but there was no usury" (*Martin v. Feeter*, 8 *Wend. R.*, 533, 534).

The third case which will be considered was decided by the present

Supreme Court of the State of New York in 1847. It was a case in equity, and came before the court upon exceptions to the master's report. It appeared that the defendant had procured the loan of uncurrent money, and the debt contracted for such uncurrent money had gone into a judgment against the defendant, and the plaintiff therein claimed to have certain surplus moneys, involved in the case before the master, applied to the payment of his judgment. The claim was resisted by a subsequent judgment creditor of the defendant, on the ground that the former judgment was for a usurious loan, and therefore void; and the master so decided, and accordingly reported that the plaintiff in the latter judgment was entitled to the surplus moneys to apply on his judgment. To this report the plaintiff in the former judgment excepted. The evidence before the master was that the party kept an exchange office, and was in the habit of lending uncurrent money, to be paid in current funds; that from time to time he had loaned to the defendant uncurrent money; and the condition of the loans was generally that they should be repaid in current money in a week; that the discount upon the money thus loaned would not average over three-fourths of one per cent, and that it could pass current in the market in the way of trade. The court decided that the transaction was not usurious, and therefore allowed the exceptions to the master's report. Harris, J., who decided the case at Special Term, said: "I do not think the facts furnish sufficient evidence to justify the court in attaching to the transaction the taint of usury. There certainly is nothing upon the face of the transaction that imputes usury, nor do I think the evidence warrants the conclusion that there was any corrupt agreement or device to receive or take more than the legal rate of interest. There is nothing in the case to show that the uncurrent money received by Duff and Ivers was not the bills of specie-paying banks. Indeed, the small discount at which these bills might be converted into specie furnishes satisfactory evidence that the bills were such as would be promptly redeemed, when presented at the counter of the banks by which they were issued. Such bills, it is well known, are, for all the ordinary purposes of money, equivalent to the same amount of specie. And unless there is something in the transaction from which it is to be inferred, as a matter of fact, that the transaction was a mere contrivance to obtain more than the legal rate of interest, by loaning bills which were not intrinsically worth their

nominal amount, the statute has not been violated. * * * I think the transaction under consideration may fairly be regarded as a mere exchange of credits. Benters held the notes of certain banks which to him were of par value, because payment could have been enforced, and which to Duff and Ivers were equal in value to gold and silver, because they would pass current in the payment of their debts. The exchange was a mutual accommodation to both parties. * * * There was no disguise in the transaction. It was in fact what it purported to be, a mere exchange of bank bills, held by one of the parties, whose marketable value was a little less than par, for the check of the other party payable at a future day, an exchange in which both parties supposed they had obtained an equivalent value. I can see no ground upon which a legal objection to the transaction can be founded" (*Slossen v. Duff*, 1 Barb. R., 432, 434-436).

The fourth case which will be referred to was decided by the New York Court of Appeals in 1851. The action involved the validity of certain promissory notes dated at Appalachicola, in the State of Florida, payable on time, with interest at eight per cent per annum. The Superior Court of the city of New York, in which the cause was commenced and tried, gave judgment in favor of the plaintiff, holding that the notes were not usurious; the Supreme Court affirmed the judgment, and the defendant appealed to the Court of Appeals, where the judgment of the Supreme Court was affirmed. Gardner, J., delivered the opinion of the court, and said: "Another point made is, that the notes are usurious upon their face. The answer to this point is found in the facts stated in the declaration, to wit: that the notes and the assumpsit of the defendant were made at Appalachicola, in the State of Florida. That the rate of interest was regulated by statute in that State, or that the common law prevails there, are mere matters of conjecture. Suspicion alone will not invalidate a contract, and there is nothing else in the case" (*Davis v. Garr*, 6 N. Y. R., 124, 133, 134).

The fifth case which will be considered was decided by the Supreme Court of the State of New York, in February, 1853, and was an appeal from the report of a referee. The defendant had a drover's bill against a butcher for three head of cattle, amounting to \$187.50, payable strictly in twenty-one, but according to ordinary usage in thirty days, applied to the plaintiff to collect it for

him, and in the meanwhile to make him an advance. The plaintiff charged him \$1.87, as for commissions on collecting; \$1.09, as for thirty days' interest; and gave him in cash \$184.54; taking his promise to pay the \$187.50, if not collected from the butcher within thirty days. The defendant interposed the defense of usury; but the referee overruled the defense, and gave judgment for the plaintiff, from which the defendant appealed to the General Term of the Supreme Court, where the judgment was affirmed. Roosevelt, J., delivered the opinion of the court, and said: "This case presents a question of usury so small as to be imperceptible to the naked eye. A technical microscope, and one of no ordinary power, is indispensable to enable the observer to discover it. A charge of nine days interest—possible, but neither probable nor contemplated—on \$187.50, is one of the usurious items complained of." After stating the facts, the learned judge proceeds: "Such a transaction, in my view, is substantially an assignment of a demand not yet due for a consideration estimated upon the basis of the probable loss of interest and the certainty of trouble, risk and responsibility; accompanied, however, on the part of the assignor, by a guaranty for the payment of the demand.

"The action now brought is virtually on the guaranty, and unless it can be shown that the form of the assignment with guaranty was resorted to as a mere cover for usury, any inadequacy of consideration, if it really existed, can only be set up by way of reduction of the recovery. * * * There is still, however, another view of the case. The plaintiffs may be considered as making a loan of the sum actually advanced in cash, and of the sum of \$2.96, charged by them for trouble, responsibility and delay of payment. That they might demand their pay before they undertook the service, cannot be disputed. Payment of rent, school bills, board, etc., *in advance*, is a thing of every-day occurrence. We may then consider the \$2.26 as so much paid in advance by the defendant to the plaintiffs, and then by them loaned to the defendant. What objection can there be to the allowance of interest on that portion of the loan, more than on the residue? Can it be said that this charge was a mere cover?

"Let us see what the plaintiffs were to do and to be subjected for this sum of \$2.26. They were to advance in cash \$184.54 for twenty-one days certain, and for thirty days probably; that being the usual delay. They were to dun the butcher, no very agree

able duty, as the proof shows, for payment of the bill. If guilty of neglect or oversight, and the debt should thereby be lost, they and not the defendant were to be responsible for the loss; and in case of a difference of opinion, which on such a subject was not only very likely but almost certain to arise, they were to take the risk of a troublesome and expensive litigation.

“To contend that a charge, whether it be denominated ‘interest’ or ‘commission,’ or both, of \$2.26, for such a service and such a liability, is unreasonable, would be simply preposterous, unless by unreasonable he meant unreasonably inadequate. How, then, without shocking common sense, can it be stigmatized as a shift or contrivance to evade the statute of usury? * * * The true character of this transaction, however, as before stated, is that of a sale and transfer of the demand, accompanied by a collateral obligation in the nature of a guaranty by the vendor. * * * Our conclusion is, that the report of the referee in favor of the plaintiffs was right, and ought to be affirmed, with costs” (*Hurd v. Hunt*, 14 Barb. R., 573-576).

The sixth case in order, which it is proposed to consider, was decided by the New York Court of Appeals, in June, 1853. The action was brought to foreclose a mortgage made by the defendant, and by the mortgagee assigned to the plaintiff, which was given to secure the payment of \$500. The defense was usury, on the ground that only \$450 was loaned, for which the mortgage was made. The proof showed that in fact only \$450 was paid over to the mortgagor at the time of the execution of the mortgage.

The justice charged the jury at the circuit that, to constitute usury so as to avoid an obligation, a corrupt agreement to pay and receive more than the lawful rate of interest must be proved; that the mere omission of the lender of the money to pay all the \$500 at the time of the execution of the bond and mortgage, in the absence of any agreement, did not make out this usury; that in his opinion the evidence fell short of proving the defense of usury, and that if the jury found for the plaintiff they must find the whole amount of the bond, with interest. The defendant requested the judge to charge the jury, that if they found that the lender intentionally withheld fifty dollars at the time of the execution of the bond and mortgage, it was evidence, unexplained, of a corrupt and usurious agreement. He declined so to charge, but instead charged that the presumption was in favor of the legality of the

transaction, to which refusal, and to the whole charge, the defendant excepted.

The jury found a verdict for the plaintiff for \$585.69, upon which a judgment was entered, and on appeal the judgment was affirmed at a General Term of the Supreme Court. The defendant then appealed to the Court of Appeals, where the judgment of the Supreme Court was affirmed.

Morse, J., delivered the opinion of the court and said: "Was the intentional withholding from the mortgagor by the mortgagee of fifty dollars of the sum expressed in the condition of the bond and mortgage made to secure the payment of \$500, with lawful interest, if unexplained, evidence of a corrupt and usurious agreement? The manner in which the term evidence was used by the defendant in his request of the judge to charge, evidently shows that it was intended to be used in the sense of proof or full and sufficient evidence, so that a verdict given against the defense of usury upon that evidence alone and unexplained would be set aside as against the weight of evidence. * * * It is manifest that there may be various other causes than 'a corrupt and usurious' agreement for which a mortgagee might 'intentionally withhold' a part of the sum received by the bond and mortgage, and which would be perfectly lawful in themselves. The law will not presume 'a corrupt and usurious' or any other unlawful agreement from a fact which is equally consistent with a lawful purpose. It is not an unfrequent case for a mortgagee to retain a part of the money loaned until the completion of a building, which is to form a part of the mortgage security. There are other contingencies, to guard against which a part of the amount included in a mortgage might be sustained, or to cover a balance of an unsettled account between the parties. Besides, he who affirms of another an unlawful act, is bound to affirmative proof of that which makes the act unlawful, and cannot insist upon a legal presumption of guilt from an act just as consistent with innocence as with guilt. * * * I am of opinion that the judgment of the Supreme Court should be affirmed" (*Booth v. Swezey*, 8 N. Y. R., 276, 278-281, 283).

The seventh case to which reference will be made was decided by the Supreme Court of the State of New York in April, 1855. The case was an appeal from a judgment entered at a Special Term upon the report of a referee. The action was brought to

recover a large amount of collateral notes and stock transferred to the defendant in a certain transaction which it was alleged by the plaintiff to be usurious. The notes and stock were deposited with the defendant as collateral security for the payment of promissory notes given in obtaining a loan of money upon an agreement that the amount of the collaterals should be applied to the payment of the loan when the notes given therefor became due. The notes deposited as collateral security, as affirmed, were numerous and for small amounts against various individuals; and the defendants gave notice to such individuals when their respective notes fell due, and attended to the collection of the same. A portion of the notes became due, and some of them were paid at various dates prior to the time when notes given for the loan became due, and the amounts credited to the borrower, but treated like other funds of the defendant held on deposit. Interest was deducted at the legal rate from the loan when made, but no interest was allowed by the defendant upon the moneys received, although they were applied on the note given for the loan when the same became due. The referee decided that the transaction was free from usury, and that the plaintiff was not entitled to have the collaterals delivered up. A judgment was entered for costs in favor of the defendant, and the plaintiff appealed to the General Term, where the judgment was affirmed. Morris, J., delivered the opinion of the court, and said: "There was no agreement or understanding that usury should be taken. The agreement established was the usual and legal one when collaterals are deposited as security, and their avails are to be applied to the payment of the notes when the notes become due. If the collaterals were paid before the notes became due, and the bank used the money, then upon a settlement of accounts the bank should allow Platt's estate interest on such moneys. The use of the money paid on such collaterals cannot be deemed usury in the notes given by Platt, unless, at the time of giving his note, the use of the money paid upon collaterals, without interest, was a part of the agreement. The facts reported by the referee show that such was not the agreement" (*Morgan v. Mechanics' Banking Association*, 19 Barb. R., 584, 586, 587).

The eighth case in order which will be referred to was decided by the Superior Court of the city of New York, in October, 1857. The case came before the court, at General Term, on appeal from

an order modifying an injunction. The plaintiffs filed a bill to recover back securities pledged by them to the defendant, for alleged usurious loans. It was charged in the bill that the plaintiffs borrowed money of the defendant, for which they gave their promissory note, which note was renewed from time to time, on the payment of extra sums of money, under the name of commissions, or for "extra trouble." The question presented was, whether a voluntary payment of a mere gratuity by the borrower to the lender, on the return of a sum of money legally loaned, necessarily made the next loan between the parties usurious, or raised a presumption that it was so. The court held that it did not. It was declared, however, that a long series of successive loans, running through a period of fifteen months or upward, and an invariable payment of large premiums on the return of the money or renewal of the period of credit, would be so suspicious as to raise a presumption that both parties understood that the payment of an exorbitant sum was the condition of the successive loans (*Storer v. Coe*, 2 *Bosw. R.*, 661).

The ninth case which will be considered was decided by the Supreme Court of the State of New York, in November, 1857, at a Special Term of the court. The action was brought to foreclose a mortgage, dated August 1, 1846, but was not, in fact, executed, nor the principal sum of money borrowed received by the defendant, the mortgagor, until the 24th of August, 1846. The defendant had paid the interest upon it regularly for nine years. The defendant interposed the plea of usury, predicated upon these facts. The plaintiff moved for judgment on account of the frivolousness of the answer, and the motion was granted. Roosevelt, J., said: "In the present case the defendants allege that the mortgage sought to be foreclosed, although dated on the first of the month, was not, in fact, executed until the 24th of August, 1846; that it was so dated on the first of the month for the purpose of reserving a greater rate of interest than seven per cent; and that the plaintiff did thereby reserve to himself, for the loan, fourteen dollars above the lawful rate. There is no averment, it will be observed, that the fourteen dollars, which constitute the grievance of the offense charged, were ever exacted or paid, and no interest is now claimed as due for the nine years prior to 1855. The defendants, in fact, admit that eighteen installments of interest, whatever they were, accruing prior to that day, were satisfactorily

arranged and paid. The idea of a recovery, therefore, is clearly an afterthought, and savors strongly of the nature of what the law denominates '*stale demand*,' and which the courts, especially when sitting in equity, invariably discharge. Besides, the defendants' answer, so far as it alleges facts, and not inferences, may be perfectly true, and yet the loan may have been, as it possibly was, engaged, and the money actually set apart in the first days of the month, the intermediate three weeks being devoted to the preparation of the papers and examination of the title. * * * Judgment for the plaintiff, with costs" (*Banks v. Van Antwerp*, 15 *How. Pr. R.*, 29-31).

The tenth case in order which will be referred to was decided by the Court of Appeals of the State of New York in 1859, on appeal from the Supreme Court. The action in the court below was upon two promissory notes. The defense was, that the notes were usurious and void. The cause was tried before a referee, who reported that the two notes were given for the balance of a bank account, due from the defendant to the Exchange Bank of Buffalo; that the account was for the repayment of checks drawn by said defendant on said Exchange Bank, payable by their terms in western and Canada bank bills, and which were thus paid; that neither such western nor Canada bank bills were received by the bank, or the plaintiff, at par, and they were not bankable at Buffalo, but were received by merchants in their ordinary deal and in trade, at their nominal value; that there was no agreement between the plaintiff and defendant that the defendant should draw his checks payable in Canada and western bills. On these facts the referee overruled the defense of usury, and reported in favor of the plaintiff. Judgment was entered on the report of the referee, which was affirmed, on appeal, by the General Term of the Supreme Court, and the defendant appealed to the Court of Appeals, where the judgment of the Supreme Court was affirmed.

Grover, J., in his opinion, said: "The payment of the defendant's checks drawn for western and Canada currency by the plaintiff in such currency, was not a violation of the statute against usury. No agreement whatever between the parties, in relation to these checks, is found by the referee" (*Codd v. Rathbone*, 19 *N. Y. R.*, 27, 38).

The eleventh case which will be considered was decided by the same court in January, 1854, on appeal from the Supreme Court.

The action was on a promissory note made by one defendant and indorsed by the others. The defendant set up the defense of usury, and on the trial at the Circuit it appeared that the maker of the note was indebted to one Hyde on a note, and went to him, telling him he wanted to give another note for it; that Hyde said he would do it on the same terms as before, which was two and a half per cent per month; that he afterward took the note to him and Hyde put his name on the back of it and told the maker to take it to the bank and get the money, which he did, and with the money paid the former note. The money was raised by the discount of the note indorsed by Hyde by the bank. On these facts the plaintiff requested the judge to hold that there was no evidence to show that the note in suit had ever been the property of Hyde, and that the plaintiff was entitled to recover. The judge refused so to decide, but submitted the case to the jury, to which the plaintiff excepted. The jury found a verdict for the defendant and a judgment was entered on the verdict, which was reversed and a new trial ordered at the General Term, and the defendant then brought an appeal to the Court of Appeals with the usual stipulation. The Court of Appeals affirmed the order of the Supreme Court, and ordered judgment absolute for the plaintiff.

Denio, Ch. J., in his opinion, said: "The plaintiff derives title to the note from the Auburn Exchange Bank, and if that bank could maintain an action upon it, the plaintiff is entitled to recover in this suit. The bank discounted it in the usual course of business for Schenck, the maker, and knew nothing respecting the transaction between Schenck and Hyde. If the defense of usury can be sustained, it must be because the note had a legal inception in the hands of Hyde before it was offered to the bank for discount by Schenck. The jury here found that it had such an inception, and the precise question is whether there was any evidence tending to establish that fact suitable to have been submitted to the jury. I think there was not. All that passed between Schenck and Hyde was that the former handed the note to the latter, who indorsed it and handed it back. Then Schenck took it to the bank and procured it discounted for his own benefit. This was a usual transaction between maker and accommodation indorser. * * * It follows that this note had its first inception when the bank discounted it for the maker, and the finding

of the jury was without any, even the slightest, evidence to support it" (*Kitchel v. Schenck*, 29 N. Y. R., 515, 517-519).

The twelfth case to which reference will be made was decided by the Supreme Court of the State of New York in May, 1864. The action was upon a promissory note, and the defendant interposed the defense of usury. The case was tried before a referee. It appeared that the note was given for the consideration of the plaintiff's interest in some land. The note was dated back to the time of the making of the deed for the land, so that it thus drew interest for some time prior to its date. The referee held that this did not constitute usury, and gave judgment for the plaintiff. The defendant appealed to the General Term, where the judgment was affirmed.

Miller, J., delivered the opinion of the court and said: "The note was dated back and provided for interest by the agreement of both the parties, and without some positive evidence to establish that this was intended as a cover for a usurious transaction, such an inference must be drawn. * * * The defendant had been in possession of the farm for some time prior to the execution of the note, and there would seem to be a propriety in dating the note on the same day as the deed.

As the contract provided no time of payment at the time it was signed by the plaintiff, it was open for negotiation and arrangement. It is evident that the plaintiff was not aware that any alteration had been made, and in claiming interest she did not intend to demand more than she was entitled to. In order to constitute usury both parties must be cognizant of the facts which make out the usurious contract" (*Powell v. Jones*, 44 Barb. R., 521, 524).

The thirteenth case which will be referred to was decided by the New York Court of Appeals in June, 1864, on an appeal from a judgment of the Supreme Court. The action was upon a promissory note by an indorsee against the maker and an indorser; the defence was usury.

It was in proof on the trial at the Circuit that the note, which was for \$265, was made by the maker for the accommodation of the indorser and held in his hands to raise money upon for his use. It was first negotiated to James and Ames Ray, under whom the plaintiff claimed as indorsee. They advanced to the first indorser, in a few days after the date, the sum of \$250. The

defendants claimed that the difference between this sum and the amount of the notes was a usurious premium. The said first indorser testified that he sold the note to the Rays for \$250, and that the business was transacted with James Ray, and he denied any recollection of any other amount. James Ray testified, among other things, that the said first indorser pretended to him that he wanted to raise money for his own accommodation, and indorsed the note to him for \$250, with the understanding that the fifteen dollars could be arranged for at a future time. He positively denied that he was to have the fifteen dollars for advancing the money; and said he did not buy the note, but took it by way of voucher for the money advanced.

On this evidence the defendants asked the judge to instruct the jury to render a verdict for the defendants, which he refused to do, and the defendant excepted. The judge charged the jury that the note first had an inception when negotiated by the first indorser, and if it was sold or discounted at a discount of fifteen dollars, it was usurious. But he further charged that if they found, from the evidence, that the arrangement was that Ray should discount the note in part, and to the extent of \$250, by advancing that amount upon it, with the understanding that the note should be held for that sum and interest thereon only, the transaction would be a valid one, and in legal effect it would be the same as if the note had been reduced by indorsement to \$250 and interest, and then transferred for that sum, and in such case the plaintiff would be entitled to recover to the amount of \$250 and interest thereon. The defendants excepted to the charge. The jury found for the plaintiff for \$250 and interest; and the judgment was affirmed at the General Term. The defendants thereupon appealed to the Court of Appeals, where the judgment was unanimously affirmed.

Denio, Ch. J., in his opinion, said: "It is quite usual for notes and mortgages to be drawn, dated and executed preparatory to a loan, and providing for the payment of interest from their date, and afterward made operative by delivery and the advancing the amount of the principal sum mentioned in them. In such cases an amount would, *prima facie*, be secured to the lender greater than the sum loaned and the legal interest, and the securities would be liable to the charge of usury; but if it could be shown that such was not the intention, but, on the contrary, that it had been

expressly agreed between the parties that interest should be payable only from the time the money was advanced, the defense of usury would be repelled. It very frequently happens that notes and bills, prepared for the purpose of being discounted, are made for a larger amount than the bank or other party which is expected to be the lender is willing to advance. If, in such case, it be agreed that only a part of the amount should be lent, and that the paper should be negotiated for the security of that amount only, the transaction is not usurious. * * * The note, on its face, contains no feature of which usury could be predicated. That was attempted to be made out by the parol evidence. There is nothing respecting interest, whether lawful or excessive, in it. The defendants made out by parol a *prima facie* case of usury; but this was subject to be met and disproved by the same species of evidence. * * * I am satisfied the Supreme Court was right, and that the appeal was without substantial merits, and am for affirming the judgment appealed from."

Hogeboom, J., in his opinion, said: "The judge charged that if the transaction was a loan of \$250 for that amount of money advanced, and the note was not to be held for any larger amount, and such was the understanding of the parties, the transaction was lawful, and the plaintiff could recover as upon a loan for that amount. This charge was excepted to, first, as not being within the range of the fact; and second, as the action was brought upon the note as an entire contract to recover the whole amount, and not a portion of the note, but not specifically upon the ground that it was not within the issue of the pleadings. I think the charge was correct, and was unexceptionable in point of law. There were also sufficient facts in the testimony of James Ray to justify its being submitted to the jury in that aspect of the case. * * * The judgment should be affirmed" (*Schoop v. Clarke*, 1 *Keyes R.*, 181, 184, 185, 188, 189).

The fourteenth case which will be considered was decided by the Supreme Court of the State of New York in 1865. The action was upon a promissory note, made by the defendants, for \$300, payable three days after date. The evidence showed that the plaintiff in the first place, purchased a note of \$300 of the defendants, for \$280, which was made by one of the defendants, and indorsed by the other defendant and another person. That note was made for the purpose of raising money upon it. When

the note was nearly due, the defendants made the note in suit, and the plaintiff wrote upon it a guaranty of the payment and collection thereof. This note was delivered to the payee, a third person, who paid to the defendants the full amount thereof in money, less the interest for the time it had to run, that is, he lent the defendants the amount of money specified in the note, less the interest which the note would have drawn if it had been made payable with interest. The plaintiff paid the amount of that note to the said payee before it became due, and received it from him. The defendants paid the money which they borrowed of the payee named in the note in satisfaction of the first mentioned note. The defense was usury. The cause was referred to a referee, and on the trial these facts appeared, and the defendants insisted that the plaintiff paid the same identical money, which they paid to him, to the payee, for the note in suit.

The referee found that the note in suit was valid in the hands of the plaintiff, and reported in favor of the plaintiff for \$358.15, the whole amount thereof. A judgment was entered on the report of the referee, and the defendants appealed to the General Term, where the judgment was affirmed.

Balcom, J., delivered the opinion of the court, and said: "The transaction was far from usury as between Ballantine and the defendant, and the note was clearly valid in the hands of the former; and if he had kept it, he could have maintained an action upon it, against the defendant, or he could have maintained an action upon the guaranty of the payment of it against the plaintiff.

"Granting that this note was made at the request of the plaintiff, and negotiated at his request to Ballantine, by the defendant, and that the money the latter obtained on it of Ballantine was paid by them to the plaintiff, in satisfaction of a note against one of the defendants, that was indorsed by the others, which was void for usury in the plaintiff's hands, the transaction did not make the note in suit against the defendants usurious or void, when it came into the plaintiff's hands. Being valid in its inception, and when it was first negotiated, it remained valid, and the defendants had no defense to it" (*Hawks v. Weaver*, 46 Barb. R., 164, 166, 167).

The fifteenth case to which reference will be made was decided by the Court of Appeals of the State of New York in 1866. The action was brought in the Supreme Court, for the foreclosure of a mortgage, and the facts of the case were, in brief, as follows:

In 1842, the defendant owned a large amount of real estate in Wayne county, New York, and was largely indebted to divers persons, some of whom were secured by mortgage on portions of the land, but most of the indebtedness was to creditors residing in the city of New York, who had perfected judgments, and issued executions to the sheriff of Wayne. The plaintiff resided in the State of New Jersey, and owned a large amount of stocks, with which it was supposed he might pay up the indebtedness of the defendant, although the stocks were, in point of fact, below par; and an arrangement was made between the defendant and plaintiff, by which the plaintiff bought up the mortgages, judgments and other demands against the defendant, a portion of which he got at discount, raising the money by a transfer of his stocks, in some instances, below par. The defendant, to secure the plaintiff for the full amount of such indebtedness, executed the mortgage in question. There were many other facts in the case, but the above is the substance of those on which the defense of usury was predicated. The referee held that the defense of usury failed, and reported in favor of the plaintiff, and ordered judgment of foreclosure; his judgment was affirmed at a General Term, and the defendant appealed to the Court of Appeals, where the latter judgment was also affirmed.

Porter, J., delivered the opinion of the court, and said: "The mortgage which the defendant seeks to impeach was for the payment of an antecedent debt. It was given to secure the precise sum legally due to the plaintiff. It represented the amount of certain outstanding claims, which he had purchased with his own means, and for his own benefit, from the creditors, by whom they were previously held. His legal rights were in no manner impaired by the circumstance that he did this at the request of the defendant, and for the purpose of averting a forced sale of his property.

"It is a misnomer to speak of the transfer of a demand by one creditor to another as a loan of money to the debtor, within the intent of the usury laws." After detailing certain efforts which had been made by the plaintiff to assist the defendant, which did not succeed, the learned judge says: "On the failure of the proposed arrangement, the plaintiff did not relinquish his purpose to aid the defendant. * * * He purchased and took assignments of the outstanding claims, making up, by the discount on some of the

purchases, for loss on others, by the transfer of his stocks, at less than par. He accepted a mortgage for the precise amount due from the defendant, payable five years from date, with annual interest. * * * It would be a gross perversion of the statute to sustain a defense of usury where no unlawful gain or advantage is either bargained for or secured by the creditor, and where no loss can be entailed on the debtor, by fulfilling the terms of his engagement. The law applicable to the facts is clear; the defense is without merit, and the judgment should be affirmed, with damages for delay" (*Crane v. Price*, 35 *N. Y. R.*, 494, 498, 499).

The sixteenth case which will be referred to was decided by the Supreme Court of the State of Pennsylvania, in 1868. The case involved the validity of a security under the usury laws, which included a stipulation to pay certain attorneys' commissions, in case the security had to be prosecuted, and it was held that such a stipulation did not render the security usurious.

Sharswood, J., delivered the opinion of the court, and said: "It ought to be considered as fairly settled by the former decisions of this court, that a creditor, on taking a security from his debtor, whether mortgage, judgment, bond or note, may lawfully include a stipulation that in the event of his being compelled to resort to legal proceedings to collect his debt, he shall be entitled to recover also with it the reasonable expenses to which he may be subjected, or a reasonable sum or commission on the amount to cover such expenses. In *Huling v. Drexel* (4 *Watts*, 126), the mortgage provided that in case of default the mortgagee might sue forth a writ of *scire facias* to recover the principal and interest, 'and all costs, charges and expenses of every kind' to which he might be put. It was held not to be usurious, nor was it an unlawful stipulation. * * * In *Fitzsimmons v. Baum* (8 *Wright*, 32), there was included in the amount to be recovered, 'all fees and expenses of such proceedings, including an attorney's commission of five per centum,' and so was the judgment which was afterward affirmed without any exceptions having been made as to that matter. In *Robinson v. Loomis* (1 *P. F. Smith*, 7), which was also a mortgage, the clause was simply 'with five per cent attorney collection fees,' and this court, in affirming the judgment, merely say: 'The five per cent stipulated to be recoverable as fees to the attorney for collection can in no sense be regarded as a penalty. It was an agreed compensation for expenses incurred by the mort-

gagees in consequence of the default of the mortgagor.' I have recited these cases at large to show that this court has set the seal of its approbation on such agreements" (*McAllister's Appeal*, 59 *Penn. R.*, 204, 206, 207).

The seventeenth case to which reference will be made under this head was decided by the Supreme Court of the State of New York in 1869. The action was brought to recover a sum unpaid on an agreement, and the defense of usury was interposed. The cause was tried before a referee, and on the trial it appeared that the defendant took a mortgage from the plaintiff, and gave back the agreement in suit, by which the defendant agreed to pay the mortgagor the amount reserved, with interest, and also to discharge the interest on the mortgage. The bond and mortgage were then transferred by the mortgagor to the superintendent of the banking department, as security for circulating notes issued to the former, equal in amount to the sum secured, and it had been given for the purpose of such transfer.

The referee decided that the contract was not tainted with usury on the facts stated, and reported in favor of the plaintiff. Judgment was perfected on the report of the referee, and the defendant appealed from the judgment to the General Term, where the judgment was affirmed.

E. Darwin Smith, P. J., delivered the opinion of the court, and said: "Whatever is the form of a particular transaction, there must be in substance and effect a loan of money to bring the case within the terms and intent of the statute. In this case there was no loan of money. It clearly was not the object or purpose of the agreement between the parties to effect or cover up a loan of money. The transaction may, perhaps, be regarded as an exchange of securities. The plaintiff executed and delivered his bond and mortgage for the defendant's agreement to pay him \$920 and interest, and pay the interest on his bond and mortgage. An exchange of securities, even though one party makes a profit by the transaction, is not usurious unless connected with a loan of money, and designed to cover such loan (*Dunham v. Dey*, 13 *Johns.*, 40; *Suydam v. Westfall*, 4 *Hill*, 211; *Ketcham v. Barber*, 4 *ib.*, 225). But I think the transaction may more properly be regarded as an arrangement for the execution and delivery of the said bond and mortgage for the consideration of \$950, the amount of its face, to be paid in the currency to be received from the banking depart-

ment upon the same. The bond and mortgage were made to be, and were, immediately transferred to the superintendent of the banking department in exchange for circulating notes. This would make the mortgage a valid mortgage immediately as between the parties. * * * At least there was no loan of money between the parties, and none intended, and we cannot say, as a matter of law, that the transaction was designed to cover a usurious transaction, and was in law in violation of the statute" (*Perrine v. Hotchkiss*, 2 *Lans. R.*, 416, 418, 419).

The eighteenth case to which reference will be made was decided by the Supreme Court of the State of New York in September, 1871.

The plaintiff's testator loaned his individual funds to the defendant's testator on bond and mortgage, with knowledge that the money was borrowed to pay the borrower's notes due to a bank of which the lender was president and financial officer, but without any agreement in that respect, and the money was actually used for that purpose. In an action to enforce the bond and mortgage, by a foreclosure and sale of the mortgaged premises, and the recovery of any deficiency which might remain on the bond, the defendant alleged that the bond and mortgage were, by reason of the facts stated, void for usury. The case was tried by a referee, who reported in favor of the plaintiffs, and the defendant appealed to the General Term of the Supreme Court, where the judgment of the referee was affirmed. The court held that the defendant could not defend the action on the ground of the alleged usurious consideration taken by the bank on negotiating the notes; and it was declared that there was no rule of law which makes it unlawful or usurious to loan a borrower money to pay the usurious debt of such borrower to another. Johnson, J., delivered the opinion of the court, and, among other things, said: "Where a new security is given to the same lender, to secure a usurious debt formerly contracted, it will partake of the taint of the original debt, even though given by a third person, if there is no other consideration than the original usurious indebtedness (*Vickery v. Dickson*, 35 *Barb.*, 96; *Bell v. Scott*, 24 *Wend.*, 230). Here, however, the mortgage is given by the borrower of the bank to a third party, and upon receiving from such party the full face of the bond and mortgage in money belonging to him. There is no element of usury in such a transaction, * * * There was no legal privity

between Rich and the bank, in the transaction in question, so far as the evidence goes" (*Wilson v. Harvey*, 4 *Lansing's R.*, 507, 509, 510).

And the *nineteenth* and *last* case which will be referred to, on this head, was decided by the Court of Appeals of the State of New York, also in September, 1871, being a very late case in that court, and but recently reported. The doctrine of the case is expressed in the head-notes of the report, viz.: That where an advance is made in one place, upon a check drawn upon a bank in another, no question of usury can arise out of the transaction, because there is no loan or forbearance of money for any time whatever. The court declared that, had there been a loan for any time, they would have had no difficulty in seeing usury under the facts of the case, unless the statute on that subject be regarded as repealed, of which there is no pretense (*Crocker v. Colwell*, 46 *N. Y. R.*, 212, 217).

Other cases might be referred to, from the reports of the different States, involving the question of usury, wherein the transactions have been upheld by the courts; but, perhaps, they would illustrate no new principle, nor shed any new light in addition to that contained in the cases already examined. It will be observed that most of the cases referred to in this chapter arose in the State of New York; and, as the statutes against usury in this State are more stringent than the laws of most of the remaining States, those authorities may be regarded as sufficiently exacting for any of the States where usury laws may exist.

CHAPTER XX.

TRANSACTIONS HELD TO BE USURIOUS — CASES OF ALLEGED MISTAKES — CASES OF PURCHASE OF NEGOTIABLE PAPER — MISTAKE IN CONSTRUCTION OF STATUTE.

HAVING considered the leading cases involving the question of usury, in which the transactions were judicially declared to be exempt from the taint of usury, it remains next to refer to some leading authorities wherein the contract was held to be within the statute against usury, which may serve as precedents from which to determine the question in any given case.

It has been asserted and demonstrated in the preceding chapters

that a contract made usurious by *mistake* of the parties will not be invalidated thereby, because in such case there is lacking the important element of a corrupt intent; but it is not all cases of mistake in reserving illegal interest that will have this effect, for if the agreement be clearly usurious it is subject to the statutory taint, though the parties did not intend it, and were ignorant that such would be the effect. The criminal intent is always a matter of legal inference where once the fact is found. This doctrine is illustrated by an early case before the Supreme Judicial Court of Massachusetts. The notes of a bank at sixty-three days would be payable at the end of the ninth week; but the officers of the bank were in the habit of receiving renewed notes the week before, charging interest for nine weeks, thus allowing in fact only eight weeks. It appeared that this was merely for the convenience of calculation, and the bank had no intention to violate the law; but the court declared the practice usurious.

Sewall, J., who delivered the opinion of the court, concludes in this manner: "It is probable that in this case there was no intentional deviation on the part of the bank, but a mistake of their right. This, however, is a consideration which must not influence our decision. The mistake was not involuntary, as a miscalculation might be considered, where an intention of conforming to the legal rule of interest was proved, but a voluntary departure from the rate. An excess of interest was intentionally taken, upon a mistaken supposition that banks were privileged in this respect to a certain extent. This was, therefore, in the sense of the law, a corrupt agreement, for ignorance of the law will not excuse" (*Maine Bank v. Butts*, 9 *Mass. R.*, 49).

The doctrine of the case of the *Maine Bank v. Butts* seems to be, in a few words, that if a greater rate than legal interest be reserved or taken by a party to a contract, upon a mistaken supposition of a legal right to do so, it is, nevertheless, a corrupt agreement within the statute. The case conforms to the English doctrine, and is in accordance with well recognized rules of law. The same question, in its present aspect, came early before the old Supreme Court of the State of New York, and a similar decision was made as in that of the Massachusetts case. The action was brought to recover the amount of a promissory note, discounted by an incorporated company supposed to be possessed of banking powers, and given to take up another note, the amount

of which was ascertained and determined upon the theory that ninety days were the fourth of a year and three days the tenth of a month, the conceded effect of which was to give the lender interest of 365 days upon a forbearance for 360 days. The defense, among others, was usury. Upon the direction of the judge at the circuit, the jury found a verdict for the plaintiff for the amount of the note, subject to the opinion of the Supreme Court on a case to be made, with leave to either party to turn it into a special verdict or bill of exceptions. The case was fully and ably argued in the Supreme Court, and judgment was ordered for the defendant, the court holding that the transaction was within the statute and usurious.

Sutherland, J., in his opinion, said: "Was the note usurious in consequence of the interest having been calculated upon the supposition that ninety days were the fourth of a year, and three days the tenth of a month? * * * It is admitted, by all writers and in all the cases upon this subject, that the intention of the contracting parties is the principal subject of inquiry in determining whether a contract be usurious or not, for if the intent of the contracting parties be righteous the contract cannot be within the statute of usury. * * * The payment and receipt of usurious interest is, *prima facie*, evidence of a corrupt agreement (1 *Saund.*, 295, 296, *in note*). It must be conceded that more than seven per cent *per annum* was received upon the discount of the note in this case. How is this presumption of law, that it was received in pursuance of a corrupt agreement, sought to be repelled? Not by showing that the sum paid for interest was greater than the parties intended should be paid, that there was a mistake in telling the money, or that the clerk who counted the interest had fallen into an arithmetical error, but by showing that the excess arose from the adoption of a principle of calculation which the parties knew would give more than seven per cent, though they believed it was not a violation of the statute. In other words, the plaintiffs received more than seven per cent, because they believed that they had a legal right to receive more. If they adjudged erroneously; it was a mistake in point of law and not in point of fact; and unless there be something in the case of usury to distinguish it from all other cases, the ignorance or mistake, in relation to the law, can afford them no protection. * * * That the principle of calculation adopted

by the plaintiffs was the one in general or universal use among banks, cannot alter the sense of the case. A statute cannot be obviated by the custom or usage of a particular trade. * * * Where the law is clear, no usage can control it. * * * The custom or usage of banks or individuals cannot shorten a year to 360 days. But a different mode of calculating interest on notes payable at sixty or ninety days and notes payable in two or three months, is established and practiced (*Vide tables in Chitty on Bills, last ed.*, 608, 609).

"I cannot, therefore, resist the conclusion that the note in this case was usurious in consequence of interest having been calculated and taken upon the principle that ninety days were the fourth of a year" (*New York Firemen Insurance Company v. Ely*, 2 *Cow. R.*, 678, 704, 705, 707, 708).

The doctrine of this case is, that casting interest upon the principle that thirty days are the twelfth of a year, sixty days the sixth of a year, ninety days the fourth of a year and the three days of grace the tenth of a month, and discounting a note upon such a calculation, is usurious, and the note, consequently, void.

A case was decided by the late assistant vice-chancellor of the first circuit of the State of New York in which the same doctrine was enunciated, and a transaction declared to be usurious where a party had taken, in addition to legal interest, a certain per cent under the name of exchange, under the mistaken impression that such sum was legal, when, in fact, the case was not one in which a charge for exchange could be properly made. A bill was filed to compel the defendant to deliver up to be canceled sundry promissory notes, alleged to be usurious, and to surrender the collateral security thereto. The notes were given for a loan of money in the city of New York under a contract by which the borrowers agreed to pay the lender for the use of his money seven per cent interest—five per cent more under the denomination of "the exchange from Savannah," and two and a half per cent upon all sales of watch movements made by them. The lender was a resident of Savannah, in the State of Georgia, from where he had brought his money, but the loan was made in New York. The court held that the transaction was usurious and granted the relief prayed for.

Sandford, A. V. C., in his opinion, said: "The case itself is one of unmitigated usury. The loan was made in this city in 1840,

and the borrowers agreed to pay Mr. Nichols for the use of the money seven per cent interest—five per cent more under the denomination of ‘the exchange from Savannah,’ and two and a half per cent upon all sales of watch movements made by them.

“The money loaned was here. True, it had been remitted to this city from Savannah, in Georgia, some time before, and upon this fact the defense is founded. It is said that the charge of five per cent was for ‘*fixing out the fund*,’ by transporting it from Georgia in order to make the loan, exchange on New York at Savannah, being at the rate of nine per cent premium, and that the legality of the charge is sustained by the decision of the chancellor and the Supreme Court in *Suydam v. Booth* (10 Paige, 94), and *Suydam v. Westfall* (4 Hill, 211, 219). * * * But there is no foundation for the charge of any exchange. Not only was the money already here, but it had been sent here without the slightest reference to this loan. The circumstance that it had come here from Savannah made it worth no more to the borrower. Even if it had cost the defendant twenty per cent to bring it here, it would buy for him no more property after it arrived, nor did our statute permit him, for that cause, to loan it at a greater profit than seven per cent.

“As well might a merchant who had brought Mexican dollars from the interior of Mexico, at an expense of ten per cent paid for insurance, freight and protection from robbers, insist, on loaning them here, that the borrower should pay him those expenses in addition to the interest. * * * It is true that there must be an intent to reserve or take more than seven per cent. In this instance the lender secured twelve per cent for the use of his money, and he intended to obtain it. The statute declares that to be usury, however ignorant he may have been of its provisions, or deceived by the use of the word *exchange*. * * * The complainants are entitled to the relief prayed for in their bill” (*Jacks v. Nichols*, 3 Sand. Ch. R., 313, 317, 320). The doctrine of this case, upon the point under consideration, is that there is an intent to take unlawful interest, within the meaning of the New York statute against usury, when more than seven per cent is reserved, although the lender took the surplus under a mistaken idea that he had a right to charge the borrower for expenses or trouble.

The case of *Jacks v. Nichols* was taken to the Supreme Court

of the State by the defendant by an appeal, and the decree of the assistant vice-chancellor was reversed and the plaintiff's bill dismissed.

Hurlbert, P. J., in giving the opinion of the court, said: "We think there can be no reasonable doubt that the contract for a loan between the parties was tainted with usury, if not in its inception, certainly upon the renewal of the securities given by the Messrs. Jacks; and the only ground of defense set up against the plaintiff's bill, which we esteem capable of being urged by the defendant, is based upon the allegation that the subsisting contract between the parties was made in the State of Connecticut, and that effect would be given to it according to the laws of that State, which, for the purposes of this case, are silent on the subject of usury. * * * This contract, in the absence of any proof to the contrary, is to be intended as legal and binding upon the parties. Having been made in the State of Connecticut, and therefore to be construed by the laws of that State, it is for the plaintiffs to show that by those laws the contract is void, before they can be entitled to the relief prayed for in their bill" (*Jacks v. Nichols*, 5 *Barb. R.*, 38, 39, 43).

It will be perceived that the Supreme Court did not differ with the assistant vice-chancellor in his conclusion that the case was one of "unmitigated usury;" but the decree was reversed upon the ground that the contract was made in the State of Connecticut, and that it was not shown to be usurious under the laws of that State. But the complainants appealed from the judgment of the Supreme Court to the Court of Appeals, where the last mentioned judgment was reversed and that of the assistant vice-chancellor was affirmed.

Gray, J., delivered the opinion of the court, and concluded thus: "The fact that the note was dated in New York is alone presumptive evidence that the maker not only resided at the place of its date, but contemplated payment there (3 *Kent's Com.*, 96). And for the purpose of charging the indorsers upon the notes, the makers must have been sought at their residence or place of business in this State. In doing that, reference must have been had to the days of grace given by the laws of this State (2 *Kent's Com.*, 459; 3 *id.*, 96; *Bank of Orange v. Colby*, 12 *New H. R.*, 520). It is therefore manifest that the continuance of the loan, made here upon substituted securities, practically agreed upon

in this State, and consummated in Connecticut, was all done with reference to the laws of this State, and that it was but the continuance of the original usurious loan, aggravated by each renewal and void by our laws" (*Jacks v. Nichols*, 5 N. Y. R., 178, 186).

And a similar doctrine was laid down by the Court of Appeals of the State of New York in an important case decided in 1865. The action was brought to recover the amount of two drafts, indorsed by the defendant and discounted by the plaintiff, at that time one of the safety fund banks, and subject to the provisions of the act of 1829. The drafts were discounted at the rate of seven per cent per annum, and interest at and after that rate was taken by the teller of the bank at the time. The net proceeds of the drafts were paid to the drawers, and the discount retained by the plaintiff at the time of the discount.

The defense interposed was that the drafts were usurious because they were discounted after the rate of seven per cent, when by the statute of 1829 safety fund banks were not authorized to take more than six per cent interest in advance on paper discounted in the ordinary course of business, which became payable within sixty-three days of the time at which it was discounted. It appeared that these drafts were made payable in eighteen and thirty-five days after their respective dates.

The only question litigated on the trial in the court below was in respect to the validity of the contract under which the plaintiff claimed to recover. The defendant had judgment in his favor at the circuit, which was afterward affirmed at the General Term of the Supreme Court for the fifth district, and the plaintiff there upon appealed to the Court of Appeals, where the judgment of the General Term was affirmed.

Brown, J., in his opinion, said: "It is thought by the counsel for the plaintiff that the charge of seven per cent by the bank originated in a mistake of the teller in estimating the amount of the discount, and, therefore, the transaction is not to be treated as a breach of the statute. The proof shows that the cashier of the bank passed the paper to the teller, Thomas J. Leach, with directions to discount it, without further instructions; and that he estimated the amount at the rate of seven per cent, and retained that amount from the proceeds, giving the balance to Perry, who said nothing to him about it. He supposed his figures and estimate were right, and did not know of the provision of the statute

at the time. He made no error or mistake in what he did. He accomplished just what he intended, which was, to take the discount at the rate of seven per cent. A mere error of figures, an innocent mistake of fact in estimating the amount of figures, would not constitute usury; because there must be an intention, a corrupt agreement, to take more than the law allows, to make out what is understood by usury. The corrupt agreement spoken of in the books is an agreement to do what the statute forbids. * * * The intention to take the forbidden rate of interest, as well as the taking of it, is established beyond a doubt."

Wright, J., in his opinion, said: "If the taking of the seven per cent was a mistake, or unintentionally done, it would not affect the validity of the transaction. But this is not pretended. The plaintiffs intended to take seven per cent interest on the discount of the drafts; and had this been a usury case, intentionally taking more than legal interest would have been, *per se*, usury. There must be a corrupt agreement, it is true, to violate the statute against usury; but when more than legal interest for the forbearance of money is intentionally taken, whether the party acts in ignorance of the law or not, it is conclusive evidence of a corrupt agreement within the statute" (*Bank of Salina v. Alword*, 31 N. Y. R., 473, 475, 479).

The doctrine of the case, so far as the question of usury is concerned, is laid down in the concluding paragraph of the opinion of Judge Wright, which is also in harmony with the opinion of Judge Brown, that, "when more than legal interest for the forbearance of money is intentionally taken, whether the party acts in ignorance of the law or not, it is evidence of a corrupt agreement, within the statute," and the contract is void.

The fact of *ignorance* is not available, under the statutes of New York, in another class of cases, one only of which is it necessary to consider. The doctrine is well laid down in a comparatively late case, decided by the present Supreme Court of the State.

The action was brought to recover the balance due upon a promissory note made by the defendant. The only defense which the evidence tended to prove was the defense of usury. The facts established on the trial were, that on the 14th of March, 1855, one John Earnest, the father of the defendant, John J. Earnest, executed his bond and mortgage to his son, George W. Earnest, for the sum of \$650, bearing interest from the 1st day of April, 1855,

for the purpose of raising that sum of money. Failing to raise the money upon the bond and mortgage, he applied to his son, John J. Earnest, one of the defendants, to give him his note and take the bond and mortgage, to which he assented; and about the 1st of June, 1855, in pursuance of the agreement, the defendants made their promissory note for \$650, and dated it back to the time the mortgage began to draw interest, payable to John Earnest, the father of one of the defendants, or bearer, and delivered it to the payee, who at the same time delivered the bond and mortgage to the defendant, John J. Earnest, with the promise to have it assigned to him when the grantee in the mortgage came out from Allegany county, where he resided, which was done about the 1st of July following. On the 8th or 9th of June, 1855, John Earnest sold the note to one Kingsley for \$605, at the same time representing it to be given for a valid consideration. The defendant, John J. Earnest, afterward sold and assigned the bond and mortgage to Henry C. Van Duzer, representing the same to be "his own," and that it was "all right in every way." On these facts the defendants recovered a verdict, and the plaintiff moved for a new trial at a Special Term before the same justice, which motion was denied, and the plaintiff then appealed to the General Term, where the order of the Special Term denying a new trial was affirmed.

E. Darwin Smith, J., delivered the opinion of the court, and said: "A promissory note, to be the subject of a sale, must be an existing, valid note in the hands of the payee, and given for some actual consideration, so that it can be enforced between the original parties. The doctrine is too well settled to be questioned, that such a note, not valid in the hands of the payee, cannot by him be rendered valid by a sale thereof to a *bona fide* purchaser at a rate of interest exceeding seven per cent. To be the subject of such sale, it must have a pre-existing validity. Its breath of life cannot be imparted through a usurious transaction. * * * The fact that indemnity was given to the accommodation maker did not render the note any the less usurious. The charge was clearly right on this point. The argument that there can be no usury where there is no corrupt agreement, and that there can be no corrupt agreement to take usury when the party discounting the paper is ignorant that it was merely made for the purpose of raising money thereon, and is, in fact, informed at the time that it is valid business paper, is not sound, if the legal effect of the

transaction involves a usurious agreement, for the law will not allow men to assert their ignorance of the laws or disclaim an intention to do what their express contracts imply. Odious as the taking of usury has ever been, in the scale of crime the offense is mere *malum prohibitum*, not *malum in se*. In many cases of decided usury there was not even an intent to evade the statute. In many cases the contracting parties did not suppose, at the time, that they were violating any law, and such, I doubt not, was this case.

* * * So far as Kingsley was concerned, there was clearly no intention to evade the statute, or to take usury. * * * He supposed he was purchasing business paper, as he lawfully might do, at a discount exceeding seven per cent. He knew, however, that he was stipulating to get more than seven per cent for the use of his money. * * * This doctrine in regard to the usurious character of a promissory note, nominally sold upon a false representation that it was business paper and given for value, had its origin before usury was made, as it is by our statute of 1837, a criminal offense, and is hardly reconcilable with the principles which would govern the questions upon the trial of an indictment for usury. * * * Independently of adjudged cases, I should think in the sale of an accommodation note, like this, that there was no usury in the transaction, and that it presented simply a case of *fraud*, where the money was obtained by fraud and false pretenses. * * * The objection of the defendants' counsel that the makers of the note in controversy in this action are estopped from setting up the defense of usury, I think cannot be maintained. I think it would be entirely just. * * * But no adjudged case has extended the doctrine so far as to preclude the defendants in this action from making the defense of usury here interposed" (*Hall v. Earnest*, 36 Barb. R., 585, 588-591).

The doctrine of this case is, that an accommodation note, having in fact, as against the maker, no validity, and never having had any legal inception, is incapable of sale; and one who buys it of the payee takes the precise place of the payee in respect to the defense of usury, although he purchased the paper in ignorance of its true character and upon the false representation that it was business paper, and given for value, and hence when such a note is sold to a *bona fide* purchaser at a rate of interest exceeding seven per cent the transaction is usurious, and the note cannot be enforced.

The courts of North Carolina have decided that a mistake in the

construction of the statute of usury, if it results in taking more than legal interest, will render the contract void, although it was admitted that such would not be the effect where the error was one of fact. Ruffin, J., delivered the opinion of the court, and said: "The discounting of a bill or bond, and taking the general indorsement of the holder, does not *ex vi termini* constitute a loan, and if the rate of discount exceed that fixed by the statute, it is a usurious loan. It is said, *non constat*, that these parties knew that the indorsers were secured thereby, without which there was no corruption. It is to be taken they knew it, and that the indorsement expresses their contract, until the contrary, as a mistake in the writing, or the like, be shown. If a person misconstrues the statute or law, he must abide by his error. If he mistakes the fact, as the amount reserved, he may show it" (*Collier v. Nevill*, 3 Dev. R., 30).

CHAPTER XXI.

TRANSACTIONS HELD TO BE USURIOUS.—WHERE THERE WAS AN ALLEGED HAZARD ATTENDING THE PRINCIPAL—CASES OF SEA RISK—CASES BETWEEN COPARTNERS—CONTRACTS IN THE FORM OF A POST OBIT—CONTRACTS IN THE FORM OF AN ANNUITY—OTHER ALLEGED RISKS.

It has been heretofore shown that the circumstance of a hazard attending the principal will exempt the transaction from the operation of the statute against usury, and cases have been referred to illustrating the doctrine. But it is not every slight contingency, where the substance of the contract is that of borrowing and lending, which will take the case out of the statute; and it has often happened that parties who have sought to get more than legal interest for the use of their money, under cover of this principle have failed, and the transaction has been held to be usurious.

An early case in the English courts illustrates the point. One Henry Wilson borrowed £2,000 of one Morse, and on being possessed of two shares, calculated to be of the value of £1,000 each share, in a brew-house, the business of which was then carried on by him and two partners, which two shares were expected to produce a larger surplus of profits to him than would be sufficient to

satisfy the interest of £2,000 after the rate of legal interest, had agreed with Morse, that in consideration of his forbearing the £2,000 till the 11th of June, 1789, he would pay him, Morse, not only the interest, but also such surplus profits as should arise from two shares of the brew-house during the time of forbearance, and the shares should be assigned over to him so as to be his own property; the Court of King's Bench held the transaction to be usurious.

Lord Kenyon, C. J., observed: "The simple question is, whether this is not an agreement to receive more than five pounds per cent allowed by law for the forbearance of a loan? Most unquestionably it is. It has been argued, however, that this was not a usurious contract, because the principal was put in hazard, as it was liable to the partnership creditors; but it was no further hazarded than in the case of every other loan, namely, by the risk of the borrower's insolvency; for as between the plaintiff and the partners in the business, he was not liable to contribute to the losses in the trade."

Buller, J., said: "In this agreement provision is made to receive the profits, but none to engage for the losses of the trade. And therefore it is not true that the plaintiff's principal was at stake, since by the terms of the contract the trade is to be carried on by the other partners, and the plaintiff is only liable to make good the losses of the trade in the event of the insolvency of the other partners. But as between these parties, if there be any losses, they must be borne by the defendant and the other partners, and if there be any profit, the plaintiff is to receive his proportion of it" (*Morse v. Wilson*, 4 Term R., 353).

Another early English case may be referred to on the point. One Renolds brought an action of debt against one Clayton for £60 upon a bond, the condition of which was, that if the defendant should pay £33 to the plaintiff on the 1st of June, if Christopher, the son of the plaintiff, was then alive, or, if he died before that day, £26, then the obligation should be void. The defendant set up the defense of usury, for that it was agreed, as above stated, upon a loan of £30 by the plaintiff to the defendant. The court held the case to be one of usury under the statutes, for it was the intention of the makers of the statutes that such subtleties should not be practiced. And it was said that here the condition might as well have been, if twenty persons, or any of them, be alive at one

day, as to have been as it was; and in this opinion both Popham, C. J., and Periam, C. B., concurred (*Renolds v. Clayton*, 5 *Coke's R.*, 70, b; *S. C.*, 2 *And.*, 15, pl. 8; and *vide Button v. Downholm*, *Cro. Eliz.*, 643).

And still another very early English case may be cited. The case was this: The obligor was bound in a bond of £300 to pay £22 10s. premium at the end of the first *three* months after the date of the instrument, and sixpence in the pound at the end of *six* months as a further premium, together with the principal itself, in case the obligor should then be living, but, in case he died within that time, then the principal was to be lost. This was adjudged to be a case of usury. Holt, C. J., said: "This is not a bottomry bond, by reason of the danger of the sea; for they who lend on bottomry bonds are as merchant adventurers." And at another day, Thompson was urging the hazard that the plaintiff ran in the case, when the chief justice observed, "I am of your opinion, Brother Thompson; for you run a great hazard, not of the casualty of death, but of the loss of your money; for it is manifestly usurious, for dying within half a year is no hazard; and if it should not be so, the statute would be easily evaded, and signify nothing" (*Mason v. Abdy*, 3 *Salk. R.*, 390).

Several American cases may be cited, in which the same distinction is recognized as in the English authorities. A leading case is one recently decided by the Court of Appeals of the State of New York, where the transaction was attempted to be sustained on the ground that it was, in substance, a bottomry bond, and, therefore, taken out of the statute. The action involved the validity of an agreement which was substantially this: Hoppock, the defendant, was to advance \$1,500 on the brig *Sophia*, loading in New York, and bound for San Francisco; and the plaintiff, Braynard, agreed to pay him, for the use of the money, twelve per cent commission and interest at seven per cent per annum from date (May 16, 1850), until the said amount was paid to said Hoppock in New York. Braynard further agreed to transfer to Hoppock the policy of insurance on the brig, for \$8,000, also the policy of insurance on the freight, and the bills of lading of cargo, together with a bill of sale of the vessel. The brig was to be consigned to Mr. Ridleman, in San Francisco, who was to collect her freight, charging the customary commissions at that place for doing the business. He was to remit to Hoppock, from the proceeds of the vessel's account,

the amount loaned and twelve per cent commission, and interest added until the funds could be placed in Hoppock's hands in New York, holding the balance subject to the order of Braynard. On receipt of the funds in New York, Hoppock was to return to Braynard the policy of insurance on the vessel and bill of sale. In case of the loss of the vessel, the insurance upon her was to be collected by Hoppock, and after paying himself the principal loaned and interest, and twelve per cent commission, as agreed, the balance was to be paid to Braynard. In pursuance of this agreement, the loan of May, 1850, was made, and subsequently a further loan of \$366, and Braynard assigned to Hoppock two policies of insurance on the vessel for \$2,000 each, and a policy on the freight for \$4,000, and also executed and delivered to him a bill of sale of the brig. Hoppock collected from the insurance companies about \$1,000 on account of policies on the vessel, and \$133 on freight policy, and Braynard brought his action to recover from Hoppock these sums of money, on the ground that the original transaction was usurious. The Superior Court of the city of New York held that the agreement was usurious, and gave judgment in favor of the plaintiff for the amount claimed. The defendant thereupon appealed to the Court of Appeals, where the judgment was affirmed.

Wright, J., who delivered the prevailing opinion, said: "The transaction, then, was a loan of money, with a charge of a premium for a loan largely in excess of legal interest. It was clearly usurious, unless of such a nature as to take it out of the statute. This is conceded; but it is claimed that the contract under which the loan was made was, in substance, a bottomry bond upon the brig *Sophia*. In this I cannot concur. * * * Bottomry is a contract by which the owner of a ship hypothecates or binds the ship as security for the repayment of money advanced for the use of the ship. It is defined by Marshall to be a contract in the nature of a mortgage of a ship, on which the owner borrows money to enable him to fit out the ship, or to purchase a cargo for a voyage proposed, and he pledges the keel or bottom of the ship, *pars pro tanto*, as a security for the repayment; and it is stipulated, if the ship should be lost in the course of the voyage, by any of the perils enumerated in the contract, the lender also shall lose his money; but if the ship should arrive in safety, then he shall receive back his principal, and also the interest agreed upon,

generally called *marine interest* (2 *Marshall on Insurance*, 733). An essential character of bottomry is, that the money lent is at the risk of the lender during the voyage, and that the repayment thereof depends on the event of the successful termination of the voyage. It is the very essence of the contract that the lender runs the risk of the voyage, and that both principal and interest be at hazard. * * * It is no bottomry when the money is payable at all events; for the principal and extraordinary interest reserved is not put absolutely at hazard by the perils of the voyage. The lender must run the maritime risk to earn the maritime interest. * * * Now look at this case in the light of those peculiar characteristics of a bottomry transaction. It seems to me there is no ground for considering the agreement a contract in the nature of bottomry, or the loan one on bottomry. * * * The lender took no risk whatever, and intended to take none" (*Braynard v. Hoppock*, 32 *N. Y. R.*, 571-574).

An early case in the State of Pennsylvania may be referred to as illustrative of this principle of hazard in transactions between copartners. The action was brought in the Court of Common Pleas of the county of Alleghany, by Evans against Negley, to recover upon an agreement between the parties under the following circumstances: The plaintiff and defendant were partners in the erection and business of a steam-mill, on terms of dividing the profits and bearing equal parts of the expense. Shortly after the mill was in operation, they agreed that Negley should take all the profits, pay the debts (except a debt due by the firm to Evans himself), and pay Evans \$8,500 for his interest in the property, *when it should be convenient*, and in the meantime pay him a "yearly rent," as the parties expressed it, of \$640, being a sum greater than the lawful interest for the purchase-money. It was further stipulated that any part of the purchase-money which might be paid should abate the rent *pro tanto*; and that Negley was to release all demands which he had against Evans, and that Evans should convey the steam-mill immediately. The contract was reduced to writing. The defense was usury; also performance. The judge who tried the cause directed the jury that the transaction was usurious, and the plaintiff excepted. A verdict, however, was rendered in favor of the plaintiff, but for a sum less than he demanded, and the case was taken to the Supreme Court on bills of exception, where the judgment was affirmed.

Gibson, J., delivered the opinion of the court, and said: "The only difficulty in the case arises from the parties having called the sum annually to be paid by Negley a *rent*. Strike out that word and the contract will present as clear a case of usury as any that can be imagined. But could a rent in fact be reserved? A rent for what? Not for the steam-mill, for that is to be conveyed to Negley in fee. It could not be a rent-charge, purchased with the \$8,500, for there was nothing definite or permanent in the estate or interest that might be supposed to be given in return for it, as Negley could at any time repay the \$8,500 and discharge himself from the payment of the annual sum. And besides, it is inconsistent with the notice of a rent-charge, that after the estate of the grantee is spent, the consideration which he gave for it should be returned to him. * * * No one who reads the agreement can hesitate to pronounce, that by the name of a rent, they in fact meant to stipulate for a compensation for the use of the purchase-money, which was to be retained. * * * And if this be the true construction of the contract, there is an end of the question" (*Evans v. Negley*, 13 *Serg. & Rawle's R.*, 218, 222, 223).

In this case it would seem that the fact that the transaction was between partners did not affect the question in the least, because, after all, the transaction was held to be a loan of money at interest, or at least that it was equivalent to a loan, with an agreement to pay exorbitant interest for the *use* of money.

The Supreme Court of the State of Wisconsin, where a partner, upon the dissolution of a firm, agreed to leave with the remaining active partners a certain sum, he to receive a certain amount every six months, whether there were profits or not, for the use of the money, for which notes were given, with the right, in case the firm should become embarrassed, to collect the principal at once, held that the transaction was a loan, and not a partnership, and therefore usurious. The fact that the transaction was *between* partners did not take it out of the question of the statute against usury. To have that effect, it must be a *partnership* transaction (*Cooper v. Tappan*, 9 *Wis. R.*, 361).

In the State of Virginia, in a case where a debtor owing a certain number of shares of bank stock agreed with his creditor to pay him, at a future day, the market price of the stock on that day, or \$150 per share, at the creditor's option, with the dividends, the court held the contract usurious. The doctrine laid down by

the court was, that where, upon a loan of money, the lender, besides his principal, contracts to receive, in lieu of interest, something which may be worth more than the legal interest, though it may, perhaps, prove to be worth less, the contract is usurious; and the case before the court was held to be one of that character, and was, therefore, declared to be usurious (*Smith v. Nichols*, 8 *Leigh's R.*, 830).

A late English case may be referred to, holding a transaction to be usurious, although the same was in the form, and partook somewhat of the nature, of a *post obit* contract or bond.

By a deed, dated in 1819, A., in consideration of £500 paid to him by B., conveyed a reversion of real estate, expectant on the death of C., the trustee, upon trust, if he should die within five years, to raise and pay to B. the sum of £1,500. At the date of the deed, C. was sixty-one years of age; but he survived until 1844, when he died. The court held that the deed of 1819 was void for usury (*Mansfield v. Ogle*, 31 *Eng. Law and Eq. R.*, 357).

A *bona fide* annuity is exempted from the operation of the statute of usury, because of the hazard which the grantor runs of ever receiving an equivalent to his principal. This has been heretofore shown; but cases *nominally* in the form of an annuity have been declared by the courts to be tainted with usury, notwithstanding the form of the transaction.

An early case in the English courts was of this character. The action was trespass, *de clauso facto*, in Northall. Plea, not guilty. A special verdict was found, that Cyprian Cory was seized in fee of the land in question; and that it was agreed that one Mary Addington should lend him £150, and, for the security of the repayment thereof, Cory leased to the said Mary his store for sixty years, to commence at the end of two years, upon condition that if he paid the £150 at the end of two years the lease should be void; and it was further agreed between them that the said Cory, for the deferring and giving day of payment of the said £150 for two years, should pay to the said Mary for interest yearly £22 10s., quarterly, if the said Mary should live so long; that in performance of this agreement she lent the said Cory £150, and he made the said lease for sixty years, and granted by fine to the said Mary an annual rent of £22 10s., to be paid quarterly, if she lived so long, and afterward conveyed the inheritance to the plaintiff; and that the said £150 was not paid; and that the said Mary took to husband Tre-

nayne, who entered for non-payment, *et si super totum*, etc. The first question was, whether it was a usurious contract within the statute, because it was a mere casual bargain; for if she dies before any day of payment of the rent, the rent was gone, and yet he should retain the £150 for two years and pay nothing for it. It was resolved that it was a usurious contract; for by intendment she might live above two years, and it is an apparent possibility that she should receive that consideration whereby the case was within the statute (*Roberts v. Trenayne, Cro. Jac.*, 507).

Another early English case was this: The action was on the statute of usury. At the trial, Richard Heighway, who was the borrower of the money, and the only witness as to the transaction, swore that he borrowed of the defendant £200 in the year 1769, which was settled six months after; that on the 5th of September, 1770, he applied to the defendant to *lend* him £600, saying he was owner of £2,042 bank annuities vested in trustees, to be transferred to him upon making out his title to an estate which was very clear; and showed Brown the declaration of trust. The defendant said he would lend him £600, or £1,000; and supplied him with £200, for which Heighway gave him a bond, and deposited the declaration of trust as a collateral security; and Brown promised he should have the remaining £400 in a fortnight's time. On the 17th of September, Heighway called for the £400. The defendant then told him "money was very scarce, upon the prospect of a Spanish war." Heighway pressed him very much; upon which he said he would see what could be done, and bid him call the next day. Heighway did so in the morning, but the defendant was not at home. He called again in the evening, and then saw Brown, who said he was afraid he could not raise it himself, but would try to get it of a friend in the city, who never was without money, but he was a *very hard man*. Heighway asked what his terms were. The defendant said they were so exorbitant he was almost ashamed to name them. Heighway said he would rather pay twenty or thirty guineas than not have the money. The defendant said his friend was not so hard as that; but that he never *lent money but upon annuities at six years' purchase*. "However," said the defendant, "if you will take the money on those terms, I will engage to furnish you with money to redeem in *three months' time*. The grantee's annuity will come but to £17 10s., which will be better than giving twenty or thirty guineas." This being

agreed to, on the 20th of September, 1770, Heighway called upon Brown for the money, and found a bond and warrant of attorney, etc., prepared for receiving an annuity from him to one Waters. Heighway executed it, and Brown signed it as the subscribing witness. After the bond was executed, Brown said he was always used to have £5 *per cent* *procuracion money*; but, as Heighway was distressed, he would only take *two and a half per cent*, and accordingly took fifteen guineas, and Heighway left the declaration of trust with him. Heighway said, "the defendant first proposed an annuity; he himself would not have granted one." When the first quarter's annuity was due, Heighway applied to the defendant and pressed him for money to redeem, as he had promised; but Brown refused. He then asked for the declaration of trust; the defendant said if he insisted upon it, Waters would enter up judgment. Heighway insisted upon it; and judgment was entered up. Heighway paid the defendant one quarter's annuity, and one quarter to the defendant's partner. The defendant often denied that he had promised Heighway money to redeem; and said he wondered how he could expect him to lend money at five per cent, when others made sixteen and a half per cent of their own money. Afterward, Brown acknowledged he was himself the *principal* that advanced the money and enjoyed the annuity, and said that Mr. Waters, whose name he had made use of, was his trustee. Waters swore that the defendant had sometimes purchased annuities in his name, but that he knew nothing of this.

The trial was had before Lord Mansfield, who told the jury, if they were satisfied that, in the true contemplation of the parties, this transaction was a purchase by the one, and a sale by the other, of a real annuity, how much soever they might disapprove of or condemn the defendant's conduct, they must find a verdict for him. But, on the contrary, if it appeared to them to have been, in reality and truth, the intention of both parties, the one to *borrow* and the other to lend, and that the form of an annuity was only a mere fraud on the necessity of the borrower by the lender, under color of which he might take a usurious and exorbitant advantage, then they might find for the plaintiff, notwithstanding the contingency of the annuitant dying within three months, more especially as it was understood by both that the annuity, at the expiration of three months, was to assume the direct shape of a loan. The jury failed at once to agree, but, coming before the court, the former direction

was repeated to them; they retired again, and at length found for the plaintiff.

The defendant made a motion for a new trial, and the case was argued at considerable length. Lord Mansfield, after adverting to the facts and the direction he gave to the jury, said: "The question is, what was the substance of the transaction, and the true intent and meaning of the parties? For they alone are to govern, and not the words used. The substance here was plainly a *borrowing* and *lending*; Heighway had no idea of selling an annuity; but his declared object was to borrow money; and accordingly he deposited the declaration of trust, which was an ample security for the sum he wanted. He goes further, and says, 'rather than not have the money, he would give £20 or £30 premium for it.' Brown tells him it must be by *annuity*; that his friend never *lent money* in any other shape; and in that method he might have it for less, viz., £17 10s., as after the first quarter he would let him have money to redeem. On the assurance that the annuity should be turned into a loan at the end of three months, the treaty proceeds. It came out that the defendant himself advanced the money. That alters the case entirely. If Waters indeed had been really the principal, this promise of Brown would have amounted to no more than a *promise to lend* at the end of three months. But Brown himself being the principal, the *promise to lend* him money to *redeem* must be understood to be a promise to *permit* him to redeem. It is true there was a *contingency* during the three months. It was *that* which occasioned the doubt whether a contingency for three months is sufficient to take it out of the statute. As to that, the cases have been looked into, and from them it appears that, if the contingency is so slight as to be merely an evasion, it is deemed colorable only, and consequently not sufficient to take it out of the statute. Here the borrower was a *sale money man*, and, therefore, we are of opinion that there was no substantial risk to take this case out of the statute" (*Richards, qui tam, v. Brown, Cowp. R.*, 770).

A case decided by the English Court of Common Pleas, early in the present century, is also a very good illustration of the point under consideration:

The action was debt on a bond, and the defense was usury. The case was tried before Lord Alvanley, C. J., where the jury found a verdict for the plaintiff, subject to the opinion of the

court upon a special case; at the same time declaring that they believed the plaintiff, Sir Charles Marsh, did not think that he was acting contrary to law.

The material facts of the case may be stated thus: The grantor of an annuity having agreed with the grantee to redeem, drew a bill of exchange for £5,000 at three years, which the grantee discounted in the following manner: He took £4,083 6s. 8d. as the amount of the purchase-money and arrears, advanced £166 13s. 4d. to the grantor in cash, and took £750 as interest for three years upon £5,000. The court held the transaction to be usurious.

Lord Alvanley, C. J., delivered the opinion of the court, and said: "It is contended, on the part of the plaintiff, that the transaction, as it appears upon the case, is neither more nor less than the purchase of an annuity, and not in the nature of a loan or sum taken for the forbearance of money due; and if that could be made out the plaintiff would be entitled to recover. * * * Then, is this transaction the purchase of an annuity, or is it not? I admit that if the annuity had been irredeemable the plaintiff would have had a right to say that he would not sell it under £5,000. But here Colonel Wood was entitled to redeem the annuity on payment of the several sums stated in the case, amounting to £4,083 6s. 8d. It was, then proposed that Sir Charles Marsh should advance £166 13s. 4d., making, with the purchase-money of the annuity, £4,250, and that he should discount a bill of £5,000 at three years. What is this but forbearing for three years to take the sum of £4,250, for which forbearance he was to receive interest on £5,000? The jury were impressed with a notion that a bill at three years was such a bill as no reputable man would discount, though it was said that some East India bills of two years' date had been discounted. * * * I think, therefore, that the discount of such a bill as this, not coupled with the transaction respecting the annuity, would have been almost sufficient to have afforded a presumption of usury; but, coupled as it is with the redemption of this annuity, it is impossible to wink so hard as not to see what the real transaction is" (*Marsh v. Martindale*, 3 Bos. & Pul. R., 154, 158-160).

In a leading case before the Supreme Court of the United States, the distinction between those transactions, in the form of an annuity, which are and are not usurious, is discussed, and the true doctrine laid down. The facts of the case, in a very few words,

were these: Schofield being seised in fee of certain property, in consideration of \$5,000, granted to Moore an annuity of \$5,000 to him and his heirs, with a right to distrain for non-payment. In the deed granting the rent-charge Moore covenanted that, at any time after five years, on the payment of \$5,000 with all arrears of rent, he, Moore, would release the rent-charge. Schofield conveyed the property to Lloyd subsequent to the payment of the rent. Moore, the rent being unpaid, levied a distress on the same, and Lloyd brought replevin and set up a defense that the transaction was usurious.

The cause was tried before the Circuit Court of the United States for the county of Washington, in the District of Columbia, and the transaction was found to be usurious. The defendant brought error to the Supreme Court of the United States, where the judgment of the Circuit Court was reversed on the sole ground that error was committed in allowing a certain witness to be sworn and give evidence who was held to be incompetent. An elaborate and very able opinion was delivered by Chief Justice Marshall, who examined the authorities upon the subject and laid down the rules by which such cases were to be determined (*Scott v. Lloyd*, 9 *Peter's R.*, 418).

The chief justice, in the course of his opinion in the case of *Scott v. Lloyd*, refers with approbation to an important case decided by the lord chancellor of England. The case was briefly this: Thomas Lawley being entitled to an annuity of £200 a year for life, sold £150, part thereof, to Rowland Davenent for £1,050, with power to repurchase, on giving six months' notice. After the death of Davenant, Lawley brought this bill against his executors for an account, and that upon payment of what should be due, the defendant might reassign the annuity to the plaintiff.

In giving his opinion, the lord chancellor said: "There has been a long struggle between the equity of this court and persons who have made it their endeavor to find out schemes to get exorbitant interest and to evade the statute of usury. The court very wisely hath never laid down any general rule beyond which it will not go. * * * In this case there are two questions to be considered: 1. Whether this assignment is to be considered as an absolute sale or security for a loan. As to the first, I think, though there is no occasion to determine it, there is a strong foundation for considering it a loan of money, and I really believe

in my conscience that ninety-nine in a hundred of these bargains are nothing but loans, turned into this shape to avoid the statute of usury." The lord chancellor then proceeds to state the circumstances under which the contract was made, and the character of the contract itself; and although there was no treaty about a loan, he concludes with saying: "Therefore, upon all the circumstances, I think it was, and is to be taken, as a loan of money, turned into this shape only to avoid the statute of usury; but I do not think I am under any absolute necessity to determine this point, for I am of opinion that this is such an agreement as this court ought not to suffer to stand, taking it as an absolute sale." And the ruling asked by the plaintiff in his bill was granted (*Lawley v. Hooper*, 2 *Atk. R.*, 278).

Other approved English authorities are referred to by the learned chief justice of the United States, in his opinion, which recognize the doctrine that loans, on a fair contingency to risk the whole money, are not within the statute against usury; that a man may purchase an annuity as low as possible, but if the treaty be about borrowing and lending, and the annuity only colorable, the contract may be usurious, however disguised (*Vide Imham v. Child*, 1 *Br. Ch. R.*, 93; *Drew v. Power*, 1 *Sch. and Lef. R.*, 182).

In conclusion upon this point of hazard, a late case may be referred to, which was decided by the Court of Common Pleas of the city of New York. The case was this: A., at the request of B., advanced to him the amount of a month's salary, which B. had to earn, and agreed to pay at the expiration of the month, and took an assignment from B. of his salary as security. The amount of the month's salary was \$67.94, for which B. received only \$62.53, the sum of \$5.42 being the interest allowed, which was more than the legal rate. The court held the transaction to be usurious. Brady, J., delivered the opinion of the court, and said: "When the lender of money assumes a risk upon the loan, by which repayment is hazarded, the contract will not be usurious, although an excessive rate of interest be charged. * * * This is not such a case. The security alone was one which depended upon a contingency, but the principal was not hazarded, the defendant being liable, though that security should fail to yield anything. * * * At first blush it appears to be one in which the plaintiff assumed the risk of the defendant's earning the salary.

* * * The case, on a full understanding of it, is one of a loan at an excessive rate of interest" (*Rowe v. Gunson*, 25 *How. Pr. R.*, 360, 362).

CHAPTER XXII.

TRANSACTIONS HELD TO BE USURIOUS—CASES OF ALLEGED PENALTY—TAKING INTEREST IN ADVANCE—ANTEDATED INSTRUMENTS—CASES IN WHICH GOODS ARE ADVANCED INSTEAD OF MONEY.

WHERE the exorbitant profit for the use of money is reserved in the nature of a penalty to be paid upon some default, which the borrower may avoid by the payment of the principal, and thus defeat the interest, if the transaction is made in good faith, it will be exempt from the operation of the statute against usury. It occasionally occurs, however, that a transaction supposed to be within this principle is held by the court to be otherwise.

A case of the character supposed was, some time ago, decided by the courts of the State of Kentucky. A judgment was recovered against a principal and surety. Then, in pursuance of an agreement, the surety signed the replevin bond, and the principal gave him a note which included the full amount of the replevin bond, with about thirty per cent added to it, and the surety agreed in writing to credit the note with the same amount, provided the principal paid the replevin bond himself. It was conceded in the pleadings in the cause that the arrangement was intended not merely to have the effect of a penal bond, but as an indemnity to the surety, in case the payment of the replevin bond should devolve on him. The court held that this contract was not an agreement for a loan of money, in a certain contingency, at a future day, upon an agreement that more than legal interest should be paid for the loan, and was usurious (*Morris' Executors v. Vance*, 3 *Dana's R.*, 362).

Where the lender receives the interest upon the sum, but before the end of the term for which the money is loaned, he clearly receives more than the legal rate; and yet cases have been referred to in preceding chapters where the practice was held not to be usurious. There are instances, however, of this character, which the courts have decided to be within the statute of usury. And a distinction was early made between the receipt of interest before the end of

the term and a reservation of the interest for the whole term, payable at certain periods within that term. The majority of opinions formerly were adverse to the legality of the first, and favorable to the validity of the latter. But the later cases do not seem always to have been decided in the light of this distinction. With regard to the taking of interest at the time of the loan, the most of the old cases hold such transactions usurious (*Vide Barnes v. Worlich, Cro. Jac.*, 25; *Anonymous*, 1 *Bulstr. R.*, 20).

The courts uniformly hold, at the present day, that the interest for ordinary paper having the usual time to run, such as is the practice by banks, may be taken in advance, by way of discount, and not subject the paper to the taint of usury. It is obvious, however, that the length of time the paper has to run must have a controlling effect upon this question. If the note has a short time to run the interest may be taken in advance, whereas the time may be so lengthened out as to make the taking of the interest, in advance, palpably usurious. A case might easily be supposed where this practice would give to the lender fifty per cent interest for the use of his money; and, indeed, the absurdity of an unyielding rule upon the subject becomes very apparent by increasing the number of years the paper has to run. It might be extended until it will be found that the person coming to get a bill discounted, for example, for a period of twenty years, instead of having anything to receive will have something to pay.

A late case in the State of Arkansas, where a bond was given to an internal improvement commissioner, in his official character, for money borrowed, "with ten per cent interest per annum, semi-annually in advance," the court held the transaction usurious and void, on the ground that the statute limits the rate to ten per cent per annum, and the stipulation for payment in advance increases the rate beyond that amount (*Hogan v. Hansley*, 22 *Ark. R.*, 413).

Cases have been heretofore referred to in which it has been held that the antedating an instrument, payable with interest from the date, is not necessarily usurious; but this depends entirely upon the circumstances of the transaction.

A case came before the vice-chancellor of the first circuit of the State of New York, in 1842, where it appeared that a bond for money loaned was dated previous to the transaction, and the lender at the time insisted that interest should be paid from the date of

the instrument, and the negotiation was accordingly completed with that understanding. The court decided that the bond was usurious (*Lynde v. Staats*, 1 *N. Y. Legal Observer*, 89).

A very easy and ready way of evading the statutes of usury has been the expedient of a pretended sale of wares, while, in reality, the wares were furnished to the buyer at a price beyond their real value, to enable him to sell them for what he could get to relieve his necessities; and when such a proceeding has come before the courts, they have universally held it to be usurious.

An early case in the English Court of Chancery well illustrates the doctrine on this point. The plaintiff, who was a student of Wadham College, Oxford, desiring to raise a sum of money immediately after his coming of age, applied to Alcan, a Jew, through whom he was introduced to James Vansommer and Paul; and they, upon inquiring into his circumstances and finding him entitled to some reversionary property, agreed to let him have silks to the amount of £2,224, for which Baker gave a promissory note, payable a year after date. Alcan officiated as the adviser of Barker during the negotiation, and the silks were delivered to and sold by him on Barker's account for £799. In the meantime James Vansommer and Paul indorsed the note over to John Vansommer, one of the defendants, who had had no share in the previous transaction. A bill was afterward brought in the Court of Chancery to compel the defendants to deliver up the plaintiff's note, upon payment of what the silks really produced upon sale; and it was contended for the defendants that there was an absolute sale. But the court held the transaction to be usurious.

Lord Chancellor Thurlow said: "I am to inquire whether, under the mask of trading, this is not a method of lending money at an extraordinary rate of interest. There is no doubt that if they had talked of this as a loan of money there would have been an end of the case. The question, then, is only, whether there is any method of showing the court that they meant so, short of their treating of it as such in plain language. There is not a doubt that in this case the transaction was merely for the purpose of raising money to supply the necessities of this young man. Do they deny knowing the goods were to be sold? I take it, therefore, as an advancement of goods, instead of money, to supply his necessities" (*Barker v. Vansommer*, 1 *Br. Ch. R.*, 149).

A case of a similar nature was decided in the English Court of

King's Bench about the time that Barker's case was decided by the Court of Chancery.

The defendant, Waller, had employed one Lemon, a money broker, to raise the sum of £200 for him. Harris & Stratton hearing of this, sent their broker to Lemon to inquire whether Waller wanted money, and to say that they would advance him £100 *in money* and £100 *in goods*, but that the goods should be choice sorts and he should not lose by them, for he should have them at the warehouse price. Waller accordingly went, in company with Lemon, to the warehouse of Harris & Stratton, who made an apology for having then *no money*, but *goods*, and desired the matter to rest a few days. Upon another application by Waller, they told him they could not let him have money, but if he would take the whole in goods, he should have them directly. Waller agreed, and the goods (hosiery ware) were sorted out by one Strutt, a broker who was present, and delivered to Waller, who gave to Harris & Stratton a bill of exchange for £220. Strutt and Lemon then carried the goods to an auctioneer, who sold them for £117 2s. 2d. An action was brought upon the bill of exchange, and the defense of usury was interposed. The question was submitted to the jury whether the transaction was a loan of money for more than the legal rate of interest, under color of a sale of goods, and the jury found the contract to be usurious.

A rule, however, was obtained for a new trial, on the ground that the transaction was not a loan, but a sale of goods; and, therefore, though it might be fraudulent, it was not within the meaning of the statute of Queen Anne. But the court expressed the opinion that, in all these cases, the question is, what is the real substance of the transaction, not what is the color and form, and that here there was no other idea than a loan of money; and, hence, the transaction was usurious. The rule was, therefore, discharged (*Lowe v. Waller*, 2 Doug. R., 736).

The rule is, therefore, well established by ancient authorities, and the same is recognized at the present day, that where usury is disguised under a sale of merchandise, the property in the goods passes to the vendee, but the excess of price over the just value is considered as a premium for the forbearance of the debt, founded on a presumed loan of so much of the purchase-money as is equivalent to the cash value of the commodity sold. It will be observed, however, that, in all these cases, the object with which the person

taking the goods entered into the transaction was the immediate means of supplying his wants ; and that the sale adopted was only colorable, and not in the common course of trade.

The same rule applies to a sale or exchange of choses in action, or credit, or where a part only of the consideration is a transfer of chattels, when the real object is a loan of money, although, in fact, no money is received by the borrower. The law, looking at the substance of the transaction, converts the substitute agreed upon by the parties into money according to its cash value. So that, in every instance where the object of the parties is a loan of money, and something else, under the form of an exchange or sale, is substituted for it, the principal of the loan, and consequently of the debt contracted by the nominal vendee, will be the value in money of the substitute received by him ; and any consideration paid or reserved to the vendor beyond that will, in general, be considered as interest for its forbearance ; and, if exceeding the legal rate, will be regarded as excessive and usurious.

A reference to a few of the leading American authorities will further illustrate the doctrine. An early case in the late Court of Chancery of the State of New York is to the point. An application was made for a loan of money, and the lender imposed, as a condition of the loan, that the borrower should purchase certain shares in an insurance company, at par, when the shares were, in fact, below par, and it was, at the time, impossible to ascertain the cash value of the shares, the corporation having failed ; and the loan was accepted upon that condition. The court held that the transaction was usurious ; and, in accordance with the law as it then stood, when relief was sought in equity against a usurious transaction, the court rescinded the sale and ordered a re-transfer of the stock, and that the sum agreed to be paid for it should be deducted from the security (*Eagleson v. Shotwell*, 1 Johns. Ch. R., 536).

And to the same import is an early case decided by the old Supreme Court of the State of New York. A. lent B. \$687, to be repaid on a certain day, with interest, and B., in consideration of the loan and forbearance, purchased of A. sixteen shares of turnpike stock, for the sum of \$400. The evidence showed that the turnpike stock was not, in fact, worth over \$250 at the time of the purchase ; but B. gave his bond for the \$687, together with the \$400 for the stock. The court held that the sale of the stock was merely colorable, and that the transaction was, therefore, usu-

rious, and the bond given for the money loaned and stock transferred was void (*Rose v. Dickson*, 7 *Johns. R.*, 196).

Another strong case upon the point may be referred to, which was decided by the same court, at a much later date. One Collins entered into a written agreement with the Bank of Rochester, by which he covenanted to assign to the bank, bonds and mortgages on real estate to the amount of \$13,000, payable in five years, with interest semi-annually, and to guarantee the payment of them; in consideration whereof, the bank agreed to transfer to Collins certain stock to the amount of \$6,500, at its nominal value, and to pay him the balance in money. Afterward, the bonds and mortgages not having been assigned, the bank transferred the stock and paid the money, on receiving two notes for \$6,500 each, agreeing to take the bonds and mortgages in payment, if delivered before the notes became due. The assignment of the stock and payment of money formed the only consideration of the notes. An action was brought to recover the amount of one of the notes, and the defendant interposed the defense of usury. It appeared on the trial that the stock, which was that of the Rochester Cotton Manufacturing Company, was, at the time it was transferred to the borrower, twenty-five per cent below par. The judge at the circuit charged the jury, among other things, that if they should be satisfied the transaction was intended by the parties (Collins and the bank) as a cover for a usurious loan, the defendant would be entitled to a verdict; but if, on the other hand, they thought the contract between the parties such as the two written agreements and the note imported on their face, and nothing more, they should find in favor of the plaintiff. The jury rendered a verdict for the plaintiff, and the defendant moved for a new trial on a case. The court held the transaction usurious, and set the verdict aside.

Cowen, J., delivered the opinion of the court, and said: "The various agreements, notes and other arrangements were all parts of one transaction, and the effect of them was to secure more than seven per cent per annum to the bank for the loan. The whole was radically and necessarily vicious because of such a usurious effect, by which the intent of the parties must be judged, and there was no question for the jury" (*Seymour v. Strong*, 4 *Hill's R.*, 255, 258).

A case in the North Carolina courts was this: The plaintiff purchased a bond of the defendant at a discount of more than legal

rate of interest, the defendant indorsing the bond in a form which bound him to guaranty the payment of the whole money due upon it. The court held the transaction usurious.

Taylor, C. J., said: "The character and substance of this transaction bespeak it to be a loan of money; although the parties constantly speak of a sale, and not a whisper is heard relative to a loan." He further observed, that if it had been a sale in truth, the assignor would have nothing to do but receive the price, and leave the assignee to obtain the money as he could from the obligors. The money was to be received for the assignor's benefit, and, the learned chief justice added, "if he had meditated a sale of the bond, he would undoubtedly have withheld his indorsement. But by adding that to the bond, he undertook on his part to repay the money, which should be seized on in the event of the obligor's delinquency. This appears to me to be the unequivocal characteristic of a loan, that the money is in all events to be repaid with interest by the borrower himself, or out of his funds" (*Ruffin v. Armstrong*, 2 *Hawk's R.*, 411).

In the State of Kentucky, where a party made a contract for the purchase of a slave at half price, and at the same time to lend the owner another sum, with a condition that if a sum, larger than the purchase-money, the loan and the interest combined, should be secured, the slave should be restored and the lent money considered as paid, the court held the transaction usurious (*Shanks v. Kennedy*, 1 *A. K. Marsh. R.*, 65).

A transaction similar in its nature was brought before the courts of South Carolina, and declared to be usurious. A. asked \$1,000 for a negro, which B. was willing to give, but could not pay cash, and A. was willing to give B. any time which he might want if he could have the price increased by the addition of ten per cent per annum until payment. After consultation as to the best method of carrying out their bargain and avoiding usury, they agreed that B. should fix the time and A. the price. B. said he must have three years, and A., the plaintiff, said he must have \$300 more. Accordingly a bill of sale was drawn expressing the consideration to be \$1,000, and a note was given by B. to A. in the following words: "Three years after date I promise to pay A. or bearer \$1,300, to be paid at such time as I please, and to deduct ten per cent per annum off of the amount paid at each payment." The

court held that the transaction was usurious (*Thompson v. Nesbit*, 2 Rich. R., 73).

In the State of Illinois, a case came before the courts, substantially thus: A. being embarrassed in his circumstances, was told by B. that C. would like to purchase certain real estate, of which A. was proprietor, upon the same terms as he had been informed that another person had purchased from A. and B., to wit: Upon receiving a guaranty that the estate would rise in value fifty per cent per annum. A. offered the same to C., who refused to purchase, saying he had no confidence in the property. A. then said that he wanted to raise \$500, and would sell C. to that amount, and guaranty a rise of fifty per cent a year for two years. C. replied, that if he would procure B. to become a guarantor to that effect, he would advance the sum required, and that A. might select the lot. A. selected and conveyed a lot by deed of warranty, received the money, and entered into a bond with B. to C., which contained the following recital and conditions, that is to say: "The said C. being seized in fee of the following town lot" (describing it) "if the said C. shall, on the 11th day of May, A. D. 1839, tender to the said A. and B. a good and sufficient deed of the aforesaid lot, the said A. and B. shall pay to the said C., his heirs, etc., the sum of \$1,000. It is agreed that, if the said deed is not tendered as aforesaid, this agreement is void." The court held that the transaction was clearly usurious; that the deed, bond, etc., should be taken together; and that, thus construed, they were merely a mortgage to secure the sum advanced with exorbitant interest (*Delano v. Rood*, 1 Gilman's R., 690).

Another case may be cited from the same State, and decided by the same court. A. and B. having made improvements upon public lands, applied to C. for a loan of \$1,110, in order to purchase them. An agreement was made that C. should advance the money, and purchase the lands in his own name as security for the loan, and that they should pay him \$330 per year for three years, and \$1,430 at the end of four years, when C. was to sell and convey the lands to them. It was further agreed that, in default of any of the payments, C. was authorized to declare the contract at an end, and all previous payments were thereupon to be forfeited; and A. and B. were thenceforth to be considered as tenants-at-will of C., at an annual rent equal to ten per cent interest on the \$2,400, payable quarter-yearly. On a bill in equity for relief brought by A.

and B. against C., they bringing into court \$1,100 and legal interest, it was held that the contract was usurious, and C. was ordered to convey the premises to A. and B. in fee (*Ferguson v. Sutphen, 3 Gilman's R.*, 547).

In the State of New Jersey, a case came before the courts, in which it appeared that a party made a loan of money to a corporation, on condition that the lender should be employed by the corporation in an official position, where he was not needed, and paid a very large salary, though the place was, in fact, a sinecure. The transaction was held to be usurious (*Griffin v. New Jersey, etc., Company, 3 Stockton's R.*, 49).

And in another case in the same State, wherein it appeared that A. agreed to loan to B. \$2,000, on condition that B. would receive from A. \$800 in goods, at prices fixed by A., and pay, or allow A. to retain, five per cent, or \$100, on the remaining \$2,000, and give A. his bond and mortgage for \$2,800, with lawful interest, the Court of Chancery held and declared that the bond and mortgage were usurious (*Brolesky v. Miller, 4 Halst. Ch. R.*, 626).

In the State of Mississippi it has been held, where the terms of a sale were cash, but a promissory note was taken for a part from the purchaser, reserving, in terms, more than legal interest, that the transaction was usurious; although it was declared by the court that it would have been held otherwise if the note had been for a gross sum, according to the terms of the original agreement, compounded of a smaller sum, and interest exceeding the legal rate (*Mitchell v. Griffith, 22 Miss. R.*, 515).

In an action brought upon a promissory note in the State of Connecticut, the defendant stated in his defense the following facts: That the plaintiff loaned to the defendant \$800, and received as security an absolute deed of a piece of land of much greater value, upon an agreement that the defendant might redeem the land upon paying the sum loaned, with twelve per cent interest; that the defendant should remain in possession of the land, and pay therefor forty-eight dollars per year, being the simple interest, as rent, for which rent the note in question was given. And, it appearing to the court that this was a true statement of the case, it was held that the transaction was usurious, and the note in suit void (*Mitchell v. Preston, 5 Day's R.*, 100).

The late Court of Chancery of the State of New York held, where the condition of a discount by a bank was that the borrower

should receive bills of exchange in payment, at more than their cash value, instead of money, that the loan was usurious; and that a custom among sellers of such bills to charge more for them when sold on credit than when sold for cash could not purge the transaction of usury. And it was declared that selling uncurrent bank notes, which are two or three per cent below par in the market, for their nominal amount in current money, to be paid in thirty days, if a cover for a loan, is usury (*Pratt v. Adams*, 7 *Paige's R.*, 615).

Another very important case came before the same court, and was disposed of upon similar principles by the assistant vice-chancellor of the first circuit. The case was this: A bank, which had stopped specie payments, and wanted money to enable it to resume and save its corporate franchises from forfeiture, applied to a trust company for a loan; and an agreement was made to the effect that the bank should deliver to the trust company their own bills of credit, or bonds, for \$250,000, payable to the latter in sterling money, at five dollars to the pound, at a banker's in London, in installments, to become due in 1842 and thereafter, with interest at six per cent per annum, payable semi-annually, and secure the £50,000, with the interest, by a trust conveyance of lands situated in New York, worth double the amount; that the bank should accept therefor the trust company's certificates, or obligations, for £48,000, payable in London in 1839 and 1840, with interest at five per cent; and that the bonds of the bank, with the interest at seven per cent, should, in fact, be paid to the trust company in New York, and that the company was to guarantee the payment of the bonds of the bank. Each certificate issued by the company in pursuance of the agreement, recited that it was part of a loan of £50,000, and the trust deed professed to be security for a loan from the trust company. The court held that the transaction was a loan of choses in action, that there was no ground for the deduction of the £2,000, consistent with the innocency of the transaction, and that the contract was usurious and void (*New York Dry Dock Bank v. American Life Insurance and Trust Co.*, 4 *Sand. Ch. R.*, 215).

The decree in this last case was reversed, on appeal to the Supreme Court, sitting in the first district, and the bill dismissed, with costs. From that decree the complainants appealed to the Court of Appeals, where the decree of the Supreme Court was reversed, and that of the assistant vice-chancellor affirmed.

Gardiner, J., in his opinion, said: "The trust company advanced their post notes (for their certificates are nothing else) as cash, at their nominal value, which I assume to be their true value in money, in the same manner that a bank of issue would receive and discount a note for a customer. In both cases there would be an exchange of promises. In each the property in the notes issued would vest in the receiver, and in neither would any money be paid; but, in both cases, a substitute, by the understanding of the parties, is advanced by the lender, and accepted as money by the borrower. Every transaction of the kind, when analyzed, will be found to be a loan of money, whether designed or not, under the form of exchange. If, then, the transaction was a *loan*, as the agreement asserts, it follows that the \$10,000, above mentioned, must be held as compensation for the forbearance of a debt incurred by the complainants *as borrowers of money*, for which the certificates were substituted at the nominal, which was the true value, by the understanding of the parties. This being in addition to the seven per cent reserved by the contract, was usury, and the bills of credit and trust deed are consequently void" (*The Dry Dock Bank v. The American Life Insurance and Trust Co.*, 3 N. Y. R., 344, 361, 362).

Reverting to the English authorities upon the phase of the subject now under consideration, where the defendant had applied to the plaintiff to discount a bill of exchange for £700, which the plaintiff refused to do, except on the following conditions: that is to say, that the defendant should take a banker's check for £250, a promissory note at two months for £286 12s., and a landscape in imitation of Poussin, to be valued at £250, to which the defendant acceded; Lord Ellenborough laid down this rule: "When a party is compelled to take goods in discounting a bill of exchange, I think a presumption arises that the transaction is usurious. To rebut this presumption, evidence should be given of the value of the goods by the person who sues on the bill. In the present case I must require such evidence to be adduced; and I wish it may be understood that, in all similar cases, this is the rule by which I shall be governed in the future. When a man goes to get a bill discounted, his object is to procure cash, not to encumber himself with goods. Therefore, if goods are forced upon him, I must have proof that they were estimated at a sum for which he could render them available upon a resale, not at what might possibly be a fair

price to charge to a purchaser who stood in need of them" (*Davis v. Hardacre*, 2 *Camp. N. P. C.*, 375).

And in a case decided by the English Court of Common Pleas, in which the action was for the penalty of the statute 12 Anne, ch. 16, the declaration stated a specific sum of money to have been lent (in which the usury consisted); but the evidence was, that the loan was part *in money*, and *the rest in goods* of a known value, which the party receiving the loan agreed to take as cash; it was held that it was clearly a usurious transaction, and that the evidence was competent to support the declaration. Heath, J., said: "The declaration seems to me to be well framed and sufficiently proved. It would make a great difference if the delivery of the goods was to be a part of the shift, and no part of the original contract. I do not see two contracts, as it was said; there appears to me to be but one; and a piece of bullion was substituted as coin" (*Burke v. Parker*, 1 *H. Black. R.*, 283, 284).

And in another case, at *nisi prius*, it was held that if, in discounting a bill of exchange, the discounteer gives goods in part, which are taken for above their real value, it is usury. And, further, that it is the province of the jury to decide whether, on the evidence, the difference of the value for which the goods were taken in the discounting, and the price for which they were sold by the party taking them, is so great as to make it apparent that they were taken only as a cover for usury (*Pratt v. Willey*, 1 *Exp. N. P. C.*, 40; *Rich v. Topping*, per Lord Kenyon, *ib.*, 176).

In the State of Mississippi, the taking of more than eight per cent interest on any contract for the payment of money, founded on any bargain, sale or loan of merchandise, goods and chattels, lands and tenements, is made illegal; but the taking of ten per cent for a *bona fide* loan of money is legal. A promissory note was given for the price of a lot of land, sold for cash, at six years, with ten per cent interest; and the court held that it was usurious (*Torry v. Grant*, 10 *Smede & Marsh. R.*, 89).

CHAPTER XXIII.

TRANSACTIONS HELD TO BE USURIOUS — CASES WHERE STOCK IS TRANSFERRED — WARRANTS OF A MUNICIPAL CORPORATION — DEPRECIATED BANK NOTES — CERTIFICATES OF TRUST AND DEPOSIT — EXCHANGE OF DRAFTS AND OBLIGATIONS.

THE temporary transfer of stock in the public funds, or in corporate bodies, is an engine of usury frequently resorted to ; although it has been shown in a previous chapter that the mere loan of stock is not usurious, nor the payment of the dividends in the meantime, even though they exceed the legal rate of interest, provided always that the transaction be one of good faith, and not a device or cover for usury. There are frequent cases, however, where the contract was in the form of a loan or sale of stocks or securities, and nevertheless held to be usurious. The earliest case which is found upon the subject is this : The defendant, Dr. Battie, lent the plaintiff several sums of money upon mortgage, and, the plaintiff having occasion for more, the defendant advanced him £1,000 in the following manner : By selling him £1,000, South Sea annuities, which at that time were under par, and sold at a loss of £76 upon the whole, and, paying him the money for which they sold, took a mortgage for the whole £1,000, at £5 per cent interest, with covenant to reduce the interest to four per cent, if paid within such a time. He afterward advanced the plaintiff £1,400 more in the same manner, by sale of so much South Sea annuities, which were then also under par, and sold at the loss of £267 15s. upon the whole, and took a mortgage for £1,400, at five per cent interest, with a power for Moore to reinstate the £1,400 at any time within two years, which was done. A bill was brought by the defendant to foreclose ; and Moore, in his answer, admitted the mortgage, and submitted in general to pay what was due. The master, in taking the account, considered those sums as £1,000 and £1,400, and computed interest upon them accordingly. The plaintiff paid the principal, interest and costs, and then brought his bill, *inter alia*, to be paid the several sums of £76 and £267 15s. and interest, insisting that he ought not to have been charged with them in the account. The defendant pleaded the proceedings under the decree in bar ; and two questions were raised : 1st, whether it was usury ; and, 2d, whether the court would relieve.

Sir Robert Henley, Lord Keeper, said: "As to the first, I am clear of opinion it is a shift within the statute. The plaintiff had but £924, instead of £1,000, in the one case, and £1,132 5s., instead of £1,400, in the other. He has paid as much interest as is equal to £5 per cent for £1,000 and £1,400, which is more than the statute allows, being more than £5 per cent for the money he received. Suppose stocks at £75 per cent; if a person takes at par, he pays £6 5s. per cent. The case of the £1,400 is not distinguishable from the other. Not so on the footing of the risk; for defendant took interest for £1,400, though, in fact, the plaintiff received but £1,132 5s." His lordship decreed payment (*Moore v. Battie*, Amb. R., 371).

Mr. Comyn, in commenting upon this case, remarks: "Now, independent of any consideration of the power which was given to the borrower of replacing the stock, and so of defeating the excess of interest, it appears that the lender, in this case, was *subject to severe loss*, whether the stock were replaced within two years or not; for if the stocks fall within two years, it might have been replaced for less money than it had been sold for. If they rose after the two years had expired, the money paid to him would not have enabled him to purchase as much stock as he originally had." And if this be correct, he thinks it difficult to reconcile the case with the cases of *Tate v. Wellings* and *Pike v. Ledwell*, subsequently decided, and which are considered in a previous chapter of this work. He intimates, therefore, that the case of *Moore v. Battie* may be regarded as overruled by the later cases (*Com. on Usury*, 107, 112). And, although the doctrine of contingency is carried to a considerable extent in the cases of *Tate v. Wellings* and *Pike v. Ledwell*, it is believed that the doctrine of those cases is more in harmony with the tenor of modern decisions than that of *Moore v. Battie*. Certainly, in the latter case the transaction was, in *form*, a transfer of stocks; and there seems to be no intimation that it was proved to be a device to obtain usury, except, so far as the fact that more than legal interest was actually received, tended to establish that position. And the rule is, that a simple *bona fide* transfer of stocks is not usurious, even though more than legal interest may be thereby realized.

Another stock transaction was declared usurious by the English courts in 1809, which may be noted. The case was this: The defendant being indebted to the plaintiffs, his bankers, in nearly £30,000,

about £21,000 of which was secured by bonds, a considerable part of which was advanced by them when stocks were below fifty pounds, agreed with them that they should place £25,000 to his credit in account, for which he was to purchase £50,000 stock, then at fifty-one one-fourth, in their names, and account to them for the dividends upon such stock as from the last dividend day. After which agreement, the plaintiffs acting upon the basis of it, though the defendant never purchased the stock so agreed upon, entered in their books the sum of £25,000 to the credit of the defendant, and continued to honor his drafts from time to time, crediting him also with other sums actually paid by him, and wrote off the amount of his bonds to his credit, and delivered them up to him. The Court of King's Bench held that this agreement to repay the *new credit* of £25,000 by the purchase of stock as at fifty pounds, when, in fact, it was more at the time the agreement was made, though it had been less when a considerable part of the money was actually advanced upon his general credit, was usurious and void. It was decided, nevertheless, that the sum of £25,000 *credited* under that agreement by the plaintiffs to the defendant in his banking account was to be reckoned against them upon balancing the account of debtor and creditor between them. It seemed to be admitted on all sides that the agreement for the purchase of the stock was illegal and invalid; but it was contended by the plaintiffs that the account should be taken between the parties upon the real advances and payments which had taken place, because the whole account, as it stood upon paper, was unreal; that an invalid agreement had been made upon the basis of a fictitious advance, which, in truth, was not made. But the court held that the £25,000 having been entered in the plaintiffs' books as an article of credit to the defendant's account, and the defendant drew for it as he wanted it, the credit could not be said to be fictitious; and, hence, although the agreement was usurious and void, the credit must be allowed (*Boldero v. Jackson*, 11 *East's R.*, 612).

In an early case in the old Supreme Court of the State of New York, a transaction relating to the purchase of stock was declared usurious and void. It was an action of debt on a bond dated October 20, 1808, conditioned to pay \$1,087. The defendant pleaded that it was corruptly agreed between the plaintiff and defendant that the plaintiff should lend the defendant \$687, to be repaid on the 1st of November, 1811, and for such forbearance the defend-

ant should purchase of the plaintiff sixteen shares of turnpike stock for \$400, when, in truth and in fact, the shares were worth only \$250; and that, pursuant to such corrupt agreement, he did purchase the said shares, and that the defendant executed the bond as well for the \$687 as for the \$400 to be paid for the shares and the forbearance of the \$687. The plaintiff demurred to the plea, and the defendant joined in the demurrer. The court held the bond to be usurious and void.

Van Ness, J., delivered the opinion of the court, and said: "Upon this statement of facts there can be no doubt that the bond is void. The cash lent to the defendant was upon the ground that he should pay double the real value of the stock, and interest is reserved upon the whole amount. Whether this was a *bona fide* sale of the stock, or colorable only, is a fact which the plaintiff may put in issue if he pleases, and it is for the jury to decide upon it. If they find that it was a fair sale, then the defendant may be liable to pay the whole amount of the plaintiff's demand. But if, on the contrary, they shall be of the opinion that the transfer of the stock was a mere device to obtain an extravagant and unlawful interest, the bond is usurious, and, consequently, void" (*Rose v. Dickson*, 7 *Johns. R.*, 196-198; and *vide Seymour v. Strong*, 4 *Hill's R.*, 255).

To the same purport was an early case decided by the courts in the State of Virginia, wherein a contract to lend a portion of the money wanted by the borrower, on condition that he would receive stock at a price much above the market value, to make up the deficiency, was held to be usurious (*Stribbling v. Bank*, 5 *Rand. R.*, 132).

And in another case in the same State, where a proposition was made to a bank to purchase its stock at par, when its actual market value was much less, upon the consideration of which the bank was to loan money to the purchaser, and the purchaser's notes were made and discounted in pursuance of the agreement; it was held by the court that the sale and the loan were one entire contract, inseparably connected with each other, and that the transaction was usurious (*Valley Bank v. Stribbling*, 7 *Leigh's R.*, 26).

In the State of Mississippi, a party made an arrangement by which he loaned to another certain stock and bank notes, which were below par, for which he took the borrower's note for the nominal value of the stock and notes; and the court held that the

contract was usurious, without regard to the use the borrower might make of the thing borrowed. The court, however, declared that, where the legal rate of interest upon a loan of stock is eight per cent upon its actual value, a loan at the rate of six per cent on its nominal value is not necessarily usurious. Whether usurious or not, will depend on whether this was a greater rate of interest than eight per cent (the legal rate) on the actual value. It was, therefore, held to be error to instruct the jury in such case that the loan was not usurious, unless they believed the loan of stock was resorted to, to cover a usurious contract. The doctrine was also properly laid down in the case, that, in respect to usury, contracts are to be governed by the laws existing at the time when they were made (*Archer v. Putnam*, 12 *Smede & Marsh. R.*, 286).

In the State of South Carolina, an incorporated building and loan association advanced, in conformity to the provisions of its constitution, to one of its members, who owned ten shares of its capital stock, \$2,000 at a premium of thirty-five per cent, equal to \$700, paid him \$1,300, being the amount advanced less the premium, and took his bond, secured by a mortgage of real estate and an assignment of his shares of the stock, for the amount advanced (\$2,000), payable, with interest at the rate of six per cent per annum, in monthly installments of twenty dollars each. The Court of Chancery held the contract to be usurious (*Columbia, etc., Association v. Bellinger*, 12 *Rich. Eq. R.*, 124).

In the State of Virginia, in a case where a bond and deed of trust were executed for a loan of money, the amount of which was made up in part of a pre-existing valid debt, and in part of stocks passed at a price considerably above the market value, the court held the transaction to be usurious. It was declared, however, that, though the bond and deed of trust were usurious and void, yet as a part of the consideration thereof was a pre-existing, valid debt, a court of equity would not compel the obligor to establish his claim at law before proceeding to enforce his security; and upon a bill framed for compelling the obligor to establish his debt at law, the court, refusing that relief, held that relief would be granted upon equitable principles (*Bank of Washington v. Arthur*, 3 *Gratt. R.*, 173).

The Supreme Court of the State of Iowa held, in a case which came before the court, that where a municipal corporation issues warrants in payment of a judgment, at the rate of one dollar in

warrants for every seventy-five cents due on the judgment, such warrants were usurious and void (*Clark v. Des Moines*, 19 *Iowa R.*, 199).

In the State of Mississippi, where a bank loaned the notes of other banks, which circulated in payment of debts, but were in fact from twenty to twenty-five per cent below par, the court held that the contract was usurious, and that the bank was only entitled to recover the specie value of the notes at the time they were lent, without interest, in accordance with the provisions of the statute of the State relating to usury. And it was further held that the use which the borrower makes of the money cannot change the result, and is not a proper subject of inquiry (*Burdusant v. Commercial Bank of Natchez*, 8 *Smede & Marsh. R.*, 533; and *vide Cook v. Bank of Lexington, Ib.*, 543; *Grand Gulf Bank v. Archer, Ib.*, 151).

Cases in which certificates of trust and certificates of deposit issued by moneyed corporations, and loaned upon interest above the legal rate, have been decided to be usurious. For example, in the State of New York, one C. H. Carroll proposed to the Farmers' Loan and Trust Company to create a trust with the company of certain land in the county of Livingston and other property in the city of Rochester, the company to advance him \$75,000 in their certificates of trust running twenty years at an interest of five per cent. Before any arrangement between the parties was completed, Carroll submitted a further proposition "to borrow from the Farmers' Loan and Trust Company \$95,000, and to convey in trust, to secure the same," real estate valued at \$190,853.90. A few days afterward Carroll proposed to divide the trust, so as to make a trust in his own name of certain property estimated at \$103,794.40, and to receive thereon, in the company's certificates of trust, \$52,000, and to create a trust, as executor of Charles Carroll, of other property estimated at \$87,059.50, and to receive thereon \$43,000 in similar certificates. The company thereupon consented to the creation of two distinct trusts, as proposed by Carroll. Accordingly Carroll, by a deed absolute on its face, expressing the consideration of \$52,000, and containing the usual covenants, conveyed the land in the county of Livingston to the company in fee. On the same day the deed was given the parties entered into and executed certain articles of agreement and declaration of trust, whereby the company covenanted, promised and agreed that they

would, in consideration of such trust, issue and deliver to Carroll their certificates of trust to the amount of \$52,000, payable to him or his assigns, and to bear an interest of five per cent, redeemable in twenty years. And it was agreed that Carroll should apply such an amount of the certificates as should be required, or of the proceeds thereof, in payment and liquidation of the liens and incumbrances on the land. The company covenanted to make sales, and to grant, execute and deliver all conveyances of the said real estate to purchasers, whenever authorized and requested by Carroll, and to receive the purchase-moneys. It was also stipulated that all securities and conveyances, leases and sales, to be made and entered into, should be made to and with the company only, who were to receive all moneys payable on such securities, etc., and to account for the same to Carroll. Carroll agreed to pay and allow to the company interest at the rate of seven per cent for the said sum of \$52,000; the difference between the interest agreed to be paid by the company on their said certificates (5 per cent) and the interest agreed to be paid by Carroll, viz., two per cent, being declared and agreed to be the only compensation, allowance or commission to the company for undertaking and executing the trust. It was also provided that whenever the company should have raised the said sum of \$52,000, with interest, they should come to an account and settlement with Carroll of the said trusts, and pay over the balance due to him, if any. And Carroll covenanted that in case the trust property and securities should be insufficient to pay the company the \$52,000 and interest, he would pay such deficiency, and that he would indemnify the company from all loss. There were other stipulations in the contract, but these here given are sufficient to present the question of usury.

Similar instruments were executed by the parties in respect to the trust of \$43,000 to Carroll as executor; and thereupon the company issued to Carroll ninety-five certificates of trust under the seal of the company, for \$1,000 each, fifty-two of which were to Carroll in his own right, and forty-three to him as executor. Each certificate certified that Carroll had deposited with the company \$1,000 in trust for twenty years, which sum the company agreed to pay to Carroll, or his assigns, with interest at the rate of five per cent, payable semi-annually. At the time the certificates of

trust were issued by the company they were worth, in the market, less than their nominal value.

On a bill filed to enforce the instruments on the part of Carroll, the defense of usury, among others, was interposed, and it was contended by defendant's counsel that the transaction was usurious, whether it be called a loan on mortgage, or a trust, or power in trust, and that it could not be enforced for any purpose or to any extent: (1) In the difference of two per cent of interest between the certificates loaned and the securities received; (2) In the loan of securities that were worth much less than their nominal value. On the contrary, the counsel for the plaintiffs contended that there was no usury in the transaction. The case was very ably argued on both sides, before the Supreme Court at General Term, where it was held that the transaction could not be enforced. 1st. Because the company did not possess the power of making loans; and, 2d. Because the loan, and all the securities relating to it, were illegal and void, as being in violation of the usury laws; that the transaction was usurious upon its face, in making a difference of two per cent between the interest to be paid by the company upon their certificates, and that agreed to be paid by Carroll. In other words, that it was, *per se*, usurious, and the plaintiffs' bill was dismissed, with costs.

Wells, J., delivered the opinion of the court, and said: "The nominal value of the certificates, at the time they were issued and delivered to Carroll, was not equal to the amount which Carroll was to pay for them by just the difference in the interest between the two. * * * I think the weight of evidence is decidedly that, at the time the loan was made, the certificates were not worth in market their par value. A number of witnesses were examined on this point, and most of them testify, in substance, that at the time this loan was effected they were at a discount of at least twelve and a half per cent, and not a witness, as I believe, shows them to have been of their par value at any time during the spring of 1838, when the negotiations were consummated. That the depreciation might have been owing, in part or in whole, to the pressure of the money market at the times to which the witnesses refer, does not, in my judgment, alter the case. Carroll bound himself to return their nominal amount in money, with lawful interest. It turned out that they were sold by Carroll, in order to raise money, at a ruinous sacrifice. * * * I am, therefore, of

the opinion that the holders of the certificates are not entitled to any decree in their favor. If I am right in holding the transaction a loan, and that it is affected with usury, then no one is entitled to any benefit from anything connected with or growing out of it. In other words, the court will not aid a party who has been connected with it, or who stands charged with notice. *Potier est conditio possidentis*" (*The Farmers' Loan and Trust Company v. Carroll*, 5 Barb. R., 613, 657, 659, 661). The doctrine of the case, expressed in the fewest words possible, is, that a loan of trust certificates of deposits, worth in market much less than par, upon an engagement to repay the par amount with interest, is usurious. And that if, for a loan of A.'s note at five per cent, he takes security from B. to repay the amount of it with seven per cent interest at the time it shall become due, it is usury *per se*.

A similar case in some respects to that of the *Farmers' Loan and Trust Company v. Carroll*, subsequently came before the Court of Appeals of the State of New York and was similarly disposed of. The case was this; The plaintiff, an incorporated insurance and trust company, took from the defendant a bond and mortgage upon real estate to secure the payment of \$3,000, with interest semi-annually, for which the company gave the defendant twenty-five per cent in cash and seventy-five per cent in the company's certificate of deposit, payable in twenty years, with interest at four and a half per cent.

The plaintiffs filed their bill in the late Court of Chancery of the State to foreclose the mortgage, and the defense of usury was interposed. The case was heard upon pleadings and proof at a General Term of the Supreme Court, where a decree was made dismissing the bill of complaint; and then the plaintiffs appealed to the Court of Appeals, where the judgment of the Supreme Court was affirmed.

Welles, J., delivered the opinion of the court, and said: "Assuming the right of the company to loan their certificates of deposit, and the transaction a loan, it was illegal and void for usury. The bond and mortgage bore interest at seven per cent and the certificate only four and a half per cent, making a difference in favor of the company of two and a half per cent or \$57.25 per year on the amount of the certificate. It is not doubted that if the certificate were actually worth in money its nominal amount at the time it was loaned, notwithstanding it bore a rate of interest less than the respond-

ents agreed to pay for the forbearance of the amount, the transaction would have been exempt from the imputation of usury. But this was not attempted to be proved. On the contrary, there is evidence in the case, which is uncontradicted, showing that the certificate was not intrinsically worth and would not sell in the market for its nominal value, which was known to the appellants. It is proved that they were in the habit of purchasing similar certificates issued by themselves at a discount. If they were loaned as money at their nominal amount, according to a well-settled principle it was usury. * * * There can be no doubt, from the evidence, that the bond and mortgage were given by the respondents and intended by them as security for a loan, nor that they received the proceeds thereof as a loan from the appellant. This was scarcely denied upon the argument. It was, in point of fact, a loan and nothing else" (*New York Life Insurance and Trust Company v. Beebe*, 7 N. Y. R., 364, 367, 368).

And where A., for the purpose of obtaining funds, proposed to B., a banker at Washington, to sell him three drafts, each for \$6,666.66, on the post-office department of Washington, and made payable, one at six, one at nine and one at twelve months from date, and to take therefor \$16,000, the drafts to be made payable to the order of C., and renewed by his indorsement and the hypothecation of bank stock, and B. accepted the proposal, advanced the money and received the draft and securities, it was held by the Supreme Court of Ohio that the transaction was *prima facie* a loan and not a sale; and by the law of Maryland, in force at Washington, such contract is utterly void for usury. And it was said that, in determining the character of contracts of this kind, a distinction is well taken between business and accommodation paper; that a bill or note, valid in its inception and furnishing a good cause of action as between the original parties to it, may be sold as a marketable commodity at such rate of discount as the parties may think proper, without subjecting the purchaser to the imputation of usury; but that it is otherwise where the bill or note claimed to have been sold is mere accommodation paper, void in its inception, fictitious in its character as between the original parties, and on which no action could be maintained till after its transfer to a third party; and that collateral securities, taken on a contract void for usury, are void in the hands of the usurer (*Corcoran v. Powers*, 6 Ohio N. S. R., 19).

The principles involved in these cases are the same as those which govern cases of the exchange of obligations; and it has been shown in a previous chapter that parties may exchange with each other their personal obligations, within certain rules, without subjecting the transaction to the charge of usury. But there are cases of this nature which have been held by the courts to be usurious, and rules have been laid down by which the question may be determined.

A very important case may be referred to upon this point, which was originally decided by the Supreme Court of the State of New York. The case was this: Certain parties having contracted with the Holland Land Company for the purchase of a large tract of land belonging to the latter, and being unable to make their payments upon the contract, they applied through Schermerhorn, one of their number, to several moneyed corporations for money. Being unable to obtain it elsewhere, Schermerhorn applied to the American Life Insurance and Trust Company for means or aid to enable the associates to fulfill their contract. Schermerhorn received encouragement that, on perfecting arrangements to establish suitable correspondents in London, the company would be able to take a deposit of the bonds agreed to be purchased, and advance, by their certificates or bonds, the funds necessary to pay for it. In the meantime an arrangement was made by which bonds or certificates were issued by the Trust Company to Schermerhorn and his associates for £12,000 sterling, for the security of which a bond was given, made by Schermerhorn and his associates, payable in a short time. It was known to both parties that those certificates could not be immediately converted into money at par, but that the amount of money required could be raised on them by hypothecating them; and they were hypothecated to Nicholas Biddle for that purpose. In the course of the same year and the next, an arrangement was made between the parties for a further advance of certificates by the American Life Insurance and Trust Company to an amount sufficient to enable the associates to pay off their debt to the Holland Land Company and entitle themselves to a conveyance of the lands, which were to be conveyed to other parties in trust to pay the Trust Company its advances, with interest and charges, and then to convey to the associates. The certificates were to bear an interest of five per cent, and be payable in London in pounds sterling, in twenty years from date, with interest payable

there, semi-annually. In July, 1838, the Trust Company issued to the associates further certificates, to the nominal amount of £35,700, which, with those before issued, amounted to the sum of £47,700. They were estimated and paid to Schermerhorn at a premium of six per cent upon \$4.44 to the pound sterling, which was about \$4.71 for the pound sterling, and were all, pursuant to a previous arrangement known to the officers of the Trust Company, sold by the associates to Biddle at \$4.44 to the pound sterling, and the proceeds, or sufficient for that purpose, were paid to the Holland Land Company upon the contract. The associates had previously agreed upon an equitable surrender and partition of the lands, etc., among themselves, according to their respective interests therein; and their respective portions of the debt due to the Trust Company were also liquidated and settled, so that each one owed his portion of the debt in severalty. Each of the associates then, for the purpose of securing the debt due to the Trust Company, gave his individual bond to the Trust Company for his portion of such debt. The plaintiff, who was one of the associates, gave his bond, dated July 10, 1838, conditioned for the payment of \$151,933.44 in ten years, with interest at the rate of seven per cent per annum, payable semi-annually. And further to secure the Trust Company, the associates directed the Holland Land Company to convey the land directly and absolutely to the other parties before referred to, in trust, to be held and disposed of, first for the payment to the Trust Company of the amounts due on the bonds of the associates. Duer, Robinson and Seward, the other parties referred to, then executed a declaration of the trusts upon which they held the land, specifying the amount of each associate's part of the debt, as mentioned in his bond, and his individual share of the property, and containing covenants to convey his share of the property to the owner, when his share of the debt should be paid. Many other facts were in the case, but these are sufficient to present the question of usury, which was raised.

Schermerhorn filed his bill in equity against the American Life Insurance and Trust Company and others, for the purpose of setting aside the bond given by him to the Trust Company, and of having the conveyance made by the Holland Land Company to Duer and others declared void, on the ground that the consideration of such bond and conveyance was usurious, and the transactions on which they were founded unauthorized and illegal.

The court held that the contract between the associates and the American Life Insurance and Trust Company was, on the part of the Trust Company, usurious and void as against the plaintiff; that the bond given by the plaintiff to the Trust Company was void as against the plaintiff, and it was ordered to be given up and canceled; that the trust claimed and attempted to be raised in favor of the Trust Company upon the deed from the Holland Land Company to Duer and others was void, and the trustees were directed to convey to the plaintiff his share of the property, and to account to him for the money or property received by them under the trust.

Mr. Justice Mullett, in a very able and exhaustive opinion, reviewed the authorities upon the subject, and gave the reasons by which the court came to the unanimous conclusion that the transaction was usurious, and made the disposition they did of the case (*Schermerhorn v. The American Life Insurance and Trust Company*, 14 Barb. R., 131).

The defendants took the last mentioned case to the Court of Appeals of the State, where the judgment of the Supreme Court, so far as the transaction was held to be usurious, was affirmed; but the judgment was modified in some particulars, not pertinent to the inquiry here. The transaction was regarded by the Court of Appeals as substantially an exchange of obligations, and the doctrine enunciated was this: "When on an application for the loan of money, the borrower in lieu thereof and in exchange for his own obligation receives the negotiable obligations of the lender for the amount, which the parties intend shall be and which are used by the borrower to raise the money, the transaction is a loan within the usury laws. And if by the obligations exchanged the amount ultimately to be paid by the borrower is greater than that to be paid by the lender, the transaction is usurious; otherwise, if the obligation of the lender is at a premium and the amount agreed to be paid to him is not greater than its cash value in the market with legal interest thereon."

Selden, J., in his opinion, said: "The true rule on this subject I hold to be this: That whenever the question of usury arises, no value can be put upon the promises or obligations of either party different from that which they import upon their face. This is usually conceded in respect to the obligations of the borrower.
* * * It may be said that, admitting a mere exchange of obligations not to be a sale, neither is it a loan; and hence that it is

entirely without the statute of usury, unless brought within it by extrinsic evidence that an evasion of the statute was intended. It is true that literally the transaction is neither a sale nor a loan, but an exchange. I apprehend, however, that, legally, in reference to the question of usury, it must be regarded as one or the other. No other distinction has ever been applied to such transactions by the courts. * * * Any difference in the *nominal* amount of the securities exchanged has been repeatedly held in England to constitute usury *per se*. * * * It makes no difference whether the discrepancy is in the principal or the interest. If it appears that, at the end of all the payments, the lender will have received more than his principal with lawful interest, the contract is usurious. * * * I consider these cases as resting upon a firm basis of principle, and as tending to establish the doctrine contended for here, that whenever the question of usury arises between the parties to any transaction, the obligations of the parties themselves cannot be estimated otherwise than at their *nominal* amount, and that consequently upon every exchange of note or other obligation the question of usury becomes one of mere computation. * * * I deem the conclusion inevitable, therefore, that the transaction was usurious."

Denio, C. J., in his opinion, said: "Without going over the evidence in this case, which, however, has been carefully examined, I am quite satisfied that the transaction between the associates and the Life and Trust Company was a loan by the latter to the former. The associates wanted money or securities which would immediately produce money. They did not desire to purchase, exchange or to procure an investment. The company had not, indeed, any ready money to loan, but they had credit, which enabled money to be raised on their engagements, and they consented to issue such engagements, upon being secured, by means of the difference of interest, considerably more than the amount which that engagement would require them to pay. Their credit, however, was not so good as that their paper of this description would command a premium in the market. On the contrary, it was considerably below par. They could not, therefore, loan such paper for more than its real value, and that value must be measured, as has already been stated, by the amount of money which it would oblige them to pay. I am, therefore, of opinion that the transaction of July, 1838, was void for usury; and if Schermerhorn could be

considered as a borrower, he would be entitled to relief against the securities executed to effect that arrangement, without the performance of any condition."

All the judges except Mitchell, J., who was of the opinion that the transaction was not usurious, and Comstock, J., who took no part in the decision, concurred in the opinions of Selden, J., and Denio, C. J. (*Schermerhorn v. Talman*, 14 *N. Y. R.*, 93, 118, 119, 121, 123, 138, 143; and *vide Dunham v. Gould*, 16 *Johns. R.*, 367).

An early case, decided by the Supreme Court of the United States, may also be referred to on this point. The case was this: Corcoran & Company discounted their notes with the Farmers' and Mechanics' Bank of Georgetown, at thirty days; and, in lieu of money, they stipulated to take the *post* notes of the bank, payable at a future day, without interest, which *post* notes were at a discount of one and one-half per cent. in the market at the time of the transaction. The court held that the transaction was usurious, and further, that the indorsement of a promissory note of a stranger to the transaction, which was passed to the bank as a collateral security for the usurious loan, although the note itself was not tainted with the usury, yet the indorsement was void, and passed no property to the bank in the note; and that the subsequent payment of the original note, for which the security was given, and the repayment of the sum received as usury, would not give legality to the transaction (*Gaitten v. The Farmers' and Mechanics' Bank of Georgetown*, 1 *Peters' R.*, 44; and *vide Bank of the United States v. Owens*, 2 *ib.*, 527).

In these cases, then, the rule would seem to be, that where notes or other obligations of the parties in equal amounts are exchanged, one is equal in value to the other, and there can be no usury in the transaction; but when either party makes an advantage in the arrangement, over and above legal interest, then the case is one of usury, if the transaction was designed as, or connected with, a loan of money, or is in point of fact a loan.

CHAPTER XXIV.

TRANSACTIONS HELD TO BE USURIOUS—CASES WHERE SOMETHING BESIDES INTEREST IS PAID FOR THE LOAN—EXTRA SUM PAID FOR BROKERAGE—EXTRA SUM PAID AS COMMISSION—EXTRA SUM PAID AS EXCHANGE.

It has been well said that it signifies not in what shape the profit upon the money lent is to accrue; it is sufficient that such profit should exceed the legal rate, in order to bring the transaction within the statute. A device often resorted to for the purpose of evading the statute is to let the money at legal interest, upon condition, however, that the borrower shall take something with the money, at a given price, when the real value of the thing taken is much less than the price allowed.

Several cases of this character are collected by Mr. Comyn in his little work on usury. Where a bankrupt, having borrowed a sum of money of the defendant for one quarter of a year, had agreed to give legal interest to the defendant for every £100; and having deposited some silk with him as a security, agreed further to give him an additional sum, *as for the use of his warehouse*; the question was, whether the interest was usurious, and the jury having found that it was not usury, Lord Holt, Chief Justice, thought that the verdict was wrong (*Le Blanc v. Harrison, Holt's R.*, 706).

So where an information stated that the defendant, by way of corrupt bargain made between him and one Edward Hayns, received of John Hayns, the administrator of the said Edward, £65; viz., for the use and occupation of a hall in Clerkenwell, in the county of Middlesex, from Midsummer (14 Jac. I) to Michaelmas (14 Jac. I), £15, and for the forbearance of £1,000 from the 16th of April, 1614, for six months then following, £50; whereas, the said house was really worth but £20 per annum, the jury found for the plaintiff (*Bedo v. Sanderson, Cro. Jac.*, 440).

And in like manner, an agreement by the borrower to allow the lender a salary as a clerk in his brewery, which would yield him more than legal interest for the use of his money, it not being intended that he should perform any services, was admitted to be corrupt and illegal (*Wright v. Wheeler*, 1 *Camp. R.*, 165, *n*; and *vide Com. on Usury*, 117, 118).

A similar doctrine was held in a recent case which was decided

by the Supreme Court of the State of Vermont. The directors of an incorporated company made an agreement with a person that if he would take the office of treasurer and provide money to carry on the business of the company, he should be paid \$300 a year and one per cent a month for money advanced, which was accepted and took effect. The court held the contract to be usurious as to the payment for money advanced, but that the other part of the contract was not invalidated (*Waite v. Windham, etc., Company*, 37 *Vt. R.*, 608).

And in another case, decided by the same court, wherein it appeared that A. loaned to B. a certain sum, and, as a part of the same transaction, B. purchased a mill of A., giving much more than it was worth, of which fact both parties were aware, though nothing was said as to the real value of the mill, the court held that the loan was usurious (*Low v. Prichard*, 36 *Vt. R.*, 183).

In the State of Kentucky, an individual loaned to another a sum of money to be paid in one year, under an agreement that the lender should have the use of a negro belonging to the borrower, instead of interest, although the hire of the negro greatly exceeded the legal interest of the money loaned. The lender took from the borrower an absolute bill of sale of the negro, but gave him a writing specifying that if he returned the money in one year he might redeem the negro. The court held the contract to be usurious; and, as the lender had kept the negro for some years, it was ordered and adjudged that he should account for the hire of the slave, to be set off against the money loaned, and interest (*McJennes v. Hart*, 4 *Bibb's R.*, 327; and *vide Richardson's Administrators v. Brown*, 3 *ib.*, 207).

And in the State of Louisiana, where the use of slaves was given in lieu of interest for money loaned, and there was a great disproportion between the value of the services of the slaves and the rate of conventional interest, it was held that the presumption was that the contract was intended to secure usurious interest, and was, therefore, within the statute against usury (*Succession of Hickman*, 13 *La. Annual R.*, 364; and *vide Galloway v. Logan*, 4 *La., N. S.*, 167).

In the State of New Jersey, where it was agreed that A. should lend B. \$2,000, on interest, and that B., for the loan, should give A., before receiving all the money, a wagon of the value of \$100, over and above the legal interest, and that, to secure the repay-

ment of the \$2,000, with legal interest, B. should give A. a bond and mortgage, and the business was closed up accordingly, the Court of Chancery held that the transaction was usurious (*Cummins v. Wire*, 2 *Halst. Ch. R.*, 73).

In the State of Virginia, where A. assigned to B. a bond executed by C., who was in doubtful circumstances, for considerably less than was due on it, and A., at the same time, executed a deed of trust on property, with condition that if the bond, with its interest, was not paid in twelve months, the trustee should sell and pay the full amount then due on the bond to B., it was held that the transaction was usurious (*Bell v. Calhoun*, 8 *Gratt. R.*, 22).

In a case decided by the Superior Court of the city of New York, where it was proved that a bank discounted a note at the full legal rate of interest for the time it had to run, and required the indorser to give them his check for \$200, in pursuance of an agreement to that effect, on which it was discounted, and the next day charged this check against this credit given on this discount, the jury found the transaction usurious, and the court, at General Term, sustained the verdict. The court held that charging the check in account showed that the indorser was to have the use of only \$300, less the discount on \$500, and was to pay therefor interest on \$500; and that the transaction was usurious *per se*. Upon such facts, it was declared that it would be proper for the court to instruct the jury to find for the defendant.

Woodruff, J., delivered the opinion of the court, and said: "That a corrupt agreement to lend \$300 and charge the borrower the interest on \$500, is usurious, we think clear; and the delivery to the lender of a promissory note, in execution of such an agreement, passes no title. * * * It is obvious that the fact, proved without contradiction, that the bank charged Pearce the \$200 check at once, and so took the money, to that extent, from his account, and had it in hand to use for its own purposes without restriction, pretty effectually contradicted such an explanation of the transaction. And, besides, we are not here to be regarded as conceding that any such explanation was warranted by the evidence, or could affect the legal character of the transaction, so long as Pearce was only allowed the use of \$297.12, and the \$200 was, in fact, in the possession and at the use of the bank, and the check protected them in that possession and use." (*Butterworth v. Pearce*, 8 *Bosw. R.*, 671, 675, 677.)

In the old Supreme Court of the State of New York, a transaction was held to be usurious, where it appeared that the maker of two promissory notes which were just due, in order to obtain a renewal for three months, agreed with the holder to give him a new note for the aggregate amount of principal, and pay the discount upon it, and the back interest, and, *in addition*, to transfer to the holder, *at par*, drafts on New York and Albany worth *three-fourths of one per cent premium*, to an amount equal to the debt, the court were unanimous in the opinion that the new note given pursuant to the arrangement was void for usury, and so declared (*The Seneca County Bank v. Schermerhorn*, 1 *Den. R.*, 133).

The present Supreme Court of the State of New York has held that an agreement by borrowers to pay the holder one-third of the profits of their business, as copartners, in addition to the legal interest, for the use of the money loaned, was usurious and void; and it was declared and decided that a promissory note, given by the borrower in pursuance of such an agreement, being void, furnished no consideration for a note given by a third party to the lender, on the purchase of the original note by him (*Sweet v. Spence*, 35 *Barb. R.*, 44).

And in a case in the late Court of Chancery of the State of New York, where, on a loan of money, the principal and interest were secured by a pledge of stocks, and the contract stipulated that the lender might keep the stock in payment, at its then market value, if he chose, without accounting for a rise in value or the dividends, the court held that the transaction was usurious, and laid down the rule, that whenever the lender stipulates, even for the chance of an advantage beyond the legal interest, the contract is usurious, if he is entitled by the contract to repayment of the money lent, with the legal interest, at all events (*Cleveland v. Loder*, 7 *Paige's R.*, 557).

So, also, where a creditor traveled, of his own accord, to his debtor's residence, and there agreed to give a further credit upon the debt being secured with interest by a mortgage, and upon the debtor paying the creditor's traveling expenses from his to the debtor's residence, and the mortgage was executed, including a sum for such expenses, the same court held that the mortgage was usurious (*Williams v. Hunn*, 7 *Paige's R.*, 581; but *vide Harger v. McCullough*, 2 *Denio's R.*, 119).

A case of similar import was decided by the old Supreme Court of the State of New York, and held to be usurious. The facts were these: Dutcher having lent to Jackson \$250, the latter brought to him a note for \$763, drawn by one Holdridge, payable to Jackson, indorsed by him and a firm of livery-stable keepers, and desired Dutcher to procure the same to be discounted. Dutcher took the note to a bank, and was there told if he would indorse it, it would be discounted; he accordingly indorsed it, and received the avails, which he applied by appropriating \$250 to refund himself for the money lent Jackson, thirty dollars for his indorsement and the trouble he had in the matter, and the residue he paid to Jackson. His own account of the affair was: "I took out \$250 which belonged to me; then I took thirty dollars for my trouble and for indorsing; I do not indorse for nothing." And, again: "I told Jackson I charged ten dollars for going to Norton (the president of the bank) to get the note discounted, ten dollars for having used my name upon the note, and ten dollars for the bother I had about the \$250; and he took the balance contentedly." Dutcher took up the note from the bank, then transferred it to the plaintiff, who brought suit upon it, and the defense of usury was interposed. The question was submitted to the jury, and a verdict was found for the plaintiff. The defendant moved the court in banc for a new trial, and it was granted. The court held that, as between Dutcher and Jackson the transaction was usurious as a question of law, and because the jury were not told so by the judge a new trial was granted (*Steele v. Whipple*, 21 *Wend. R.*, 103).

In order to arrive at the conclusion the court did in this case, they had to find that Dutcher was, in fact, the lender of the money, and perhaps the evidence clearly showed that he was; but, it has been well said of the case, that it "stands near the line which divides two well settled classes of cases, one adjudging a transaction to be usurious, *per se*, and the other that it is not, but so fraught with suspicions of usury, in disguise and in intent, that a jury may find it."

The same principle governs in those cases where an extra sum is to be paid for brokerage as compensation to an agent. It is admitted that where a broker or agent advances money for his principal he may lawfully take an *extra* sum or allowance for his trouble and attention, in addition to the legal interest on the money

advanced. Cases of this character, which have been upheld by the courts, have been referred to in a previous chapter. It seems to be the rule in these cases, that unless the jury find that the commission was a cover for usury, the court cannot intend that it was so, if it appears that there was really any substantial trouble upon which a compensation might be claimed. For, according to the language of Lord Ellenborough, the court has no scales nice enough to balance the trouble imposed upon the party; and without some proof to the contrary, the compensation must be taken to be a fair one. All commissions, where a loan of money exists, must be ascribed to and considered as an excess beyond legal interest, unless as far as it is ascribable to trouble and expense *bona fide* incurred in the course of the business transacted by the persons to whom such commission is paid; but whether anything and how much is justly ascribable to this latter account, is always a question for the jury (*Palmer v. Baker*, 1 *Maule & Selw. R.*, 56; and *vide Custairs v. Stein*, 4 *ib.*, 192).

But cases have often been before the courts, which were, in form, transactions of commission and compensation for trouble, yet nevertheless found to be colorable or excessive, and declared usurious. It was held by Lord Tenterden, in a well considered English case, that where the lender stipulates with the borrower that the latter shall pay a commission to the lender's agent, it is usurious, although the lender himself retains nothing but the legal discount (*Meagoe v. Simmons*, 1 *Moody & Malkin's R.*, 121).

It has been held by the Supreme Court of Pennsylvania that where it appeared that the holders of certain judgments, by assignment, were to receive, as commission merchants, from the defendants, who were iron masters, iron for sale on commission, that they were entitled to interest upon the judgments and to commissions on sales and guaranties of paper received, but not to an additional commission of two and one-half per cent on advances; that the charge of additional commissions on advancements was usurious, and could not be enforced at law, either upon evidence of a promise by the defendants to pay it, or in consequence of their failure to comply with their agreement in furnishing iron according to their contract.

Thompson, J., who delivered the opinion of the court, said: "The judgments which the plaintiffs received by assignment, and which they undertook to pay and did pay, bore interest, and this

was all the interest they could recover. They had commissions on sales of iron and guaranties. This was a proper charge in the accounts current, but the two and a half per cent for advances was not. It is true there was evidence of a promise to allow these commissions; but as they are usurious, the agreement cannot be enforced. If the defendants chose to fly from their promise in this respect, the law permits them to do so. It is a matter entirely within the cognizance of their own conscience" (*Grubb v. Brooke*, 47 Penn. R., 485, 488; and *vide Large v. Passmore*, 5 Serg. & Rawle's R., 51).

In the State of West Virginia, a case came before the courts, in which it appeared that B. agreed to purchase and raise for T., during the next year, about 8,000 hides; to tan them in Virginia and deliver them in New York. For those purchased by B. the drafts of B. at three months were to be accepted by T., and T. was to be allowed five per cent commission or advance on the cost of the hides, whether purchased by himself directly or by B., and to sell the leather at his discretion, and be allowed six per cent commission and guaranty on the gross amount of the sales; and after deducting the cost of the hides and expenses thereon, with interest on the same from the time they became due, or were paid for by T., together with any expenses he may have had to pay on the leather, as well as any advances he may have made, together with the advance on hides and commission on leather, as specified, to pay over to B. the net proceeds of the same; the property in all the hides and leather to be in T., who was to pay the insurance and charge the cost thereof to B. T. purchased 801 hides and B. 10,154. T. was a New York leather dealer, and B. a Virginia tanner. The court held that the transaction was usurious (*Brakely v. Tuttle*, 3 W. Va. R., 86).

The old Supreme Court of the State of New York, where goods *fraudulently* obtained were deposited with an auctioneer, who made an advance upon them, and charged five per cent besides the usual commissions, held that the transaction was usurious; and for that cause the auctioneer was declared not entitled to be considered as a *bona fide purchaser*, in an action of *trover* brought against him by the party from whom the goods were obtained, although he was wholly innocent of the fraud. The court seems almost to have taken it for granted that the transaction was usurious, and only discussed the question as to whether the auctioneer

was liable in *trover* to the owner of the goods, because he received them under an arrangement which was usurious (*Ramsdell v. Morgan*, 16 Wend. R., 574).

And in a certain case before the same court, it appeared that R. was applied to by P. for a loan of money, but not having it, referred him (P.) to his son-in-law, whose usage he said it was to receive seven per cent, besides legal interest; and, by arrangement between himself and P., received P.'s note with an indorser, and procured the money of his son-in-law, at the rate mentioned by him, on his own note, which he afterward paid, and gave P. credit from time to time on P.'s successive indorsed notes, held by R. himself. The court held that R. must be considered the lender of the money; that he did not stand in the light of a mere security of P., and that the notes taken by him were usurious and void. It was further held by the court that, where the original loan is usurious, all the securities therefor, however remote or often renewed, are void. The doctrine was also declared that, where one, as agent, lends money for another, at a usurious rate of interest, and afterward pays him, and takes security from the borrower in his own name, it is void, though he derive no benefit from the loan and the premium go to the exclusive benefit of the principal. Sutherland, J., in delivering the opinion of the court, said: "The only supposition upon which the usury can be got rid of is, that Parker's note was not given for the loan, but was given in payment of the \$800, which the plaintiff had paid Roswell Reed. Every fact in the case is at war with such a supposition. The plaintiff did not pay Roswell Reed until about a year after the loan was made. But Parker's note was given either the day before or the very day that he received the money. It could not, therefore, have been given in satisfaction of an advance which had not been made.

"In every point of view, I consider this one of the clearest cases of usury that was ever presented to a court of justice; and if the miserable contrivance which has been resorted to, to screen this transaction from the operation of the statute, should prove effectual, either the law itself, or the administration of it, would be brought into deserved dishonor" (*Reed v. Smith*, 9 Cow. R., 647, 651, 652; and *vide Levy v. Gadsby*, 3 Cranch's R., 180).

In the State of Vermont, in a case decided by the Supreme Court, it appeared that an agent, in negotiating a loan, sold his

property to the borrower at a price much above the true value, and it was clear that the purchase was made in order to procure the loan, though without the actual knowledge of the lender; it was held, in a suit by the principal to enforce a security for the loan, that the transaction was usurious; that is to say, that, under the laws of the State, the price of the goods above the true value thereof was usury (*Austin v. Harrington*, 28 *Vt. R.*, 130; but *vide Baxter v. Buck*, 10 *id.*, 548).

And in the State of Virginia, where it appeared that F. & N. were indebted to a bank, for which the bank had recovered a judgment against them, whereupon they applied to the bank for indulgence, and the bank agreed to give them a long indulgence, upon condition that they would give real security for the debt, and moreover to pay the attorney of the bank all the costs of the suit, and the commission which the bank had agreed to give him for collecting and receiving the debt, to which they acceded; and, accordingly, the debtors gave the real security for the debt, and one of them paid the *costs* and part of the *commissions* of the attorney, and a note was given to the attorney for the balance of the commissions; the attorney having full notice of the terms of the agreement between the bank and the debtors; the court held that the agreement between the bank and the debtors, and, therefore, the note given for the commissions to the attorney, were usurious, and could not be enforced (*Toole v. Stephen*, 4 *Leigh's R.*, 581).

An interesting case may be referred to, which came before Lord Kenyon, of England, and by him held to be usurious, but which has since been the subject of considerable discussion. The case was this: The defendants were bankers at Portsmouth, and on the 21st of December, 1792, Thomas Knott, the servant of a Mrs. Stewart, drew a bill for £600 on Sedley, her agent in London. The bill was payable to the defendants, or order, thirty days after date, and, immediately after it was drawn, it was taken to the defendants, who gave their note for £600, payable three days after sight, in London. For this the defendants received a discount of five per cent, calculated on the thirty days the bill had to run, but making no deduction on account of the three days the note had to run after sight, or of the three days' grace which the bankers took thereon. Knott, on cross-examination, admitted that the money to be received on the draft was to be remitted to London, but swore that no money was offered to him by the defendants, but that they

gave him the note at three days' sight, without asking any questions as to the mode in which he would be paid the money. All the other transactions between the parties were of the like nature; and another witness proved that these notes, payable at three days' sight, were discounted when they arrived in London. Lord Kenyon said he was clearly of opinion that this was a usurious contract, whether the person discounting the bill chose to receive a note or money. If Mrs. Stewart chose to have a note payable in town, the defendants should not have taken interest for the time the note had to run, but should compute the interest from the time it was payable; and on Mr. Lubback, the banker (who was on the jury), saying that, whenever he sent a bill to Bristol, the drawee sent a bill on London, payable at thirty days after date, his lordship said that the law in this case was clear, and that no usage whatever could control it. On this the parties compromised the cause, and agreed to withdraw a juror; which done, Lord Kenyon said: "Now the cause is over, I must say one word for myself. I am most clearly of opinion that this is usury. Whether the party consented or not can make no difference. She was entitled to receive in money the amount of the bill, after deducting the interest for the time it had to run. The defendants could not give a note payable in six days without deducting from the discount the interest for those six days. There may be cases where a country banker may be entitled to receive more than five pounds per cent; such was the case of Sudbury Bank, which came on in this place some years ago, and in which my opinion concurred with that of the jury. But all men, lawyers or not lawyers, must agree on this case, because here was a second discount paid on the notes. The case is so clear that no two men in the profession can entertain different opinions on it" (*Matthews, qui tam, v. Griffiths, Peake's N. P. C.*, 200).

And, according to a manuscript note of this case, Lord Kenyon, in the course of his opinion, used the following expressions: "When a party takes five pounds per cent. discount *as for ready money*, and yet does not pay for ready money, but bills payable at a future day, though both parties consent to this transaction, and though it may be for the convenience of both, I am clear that it is usury." And "this is an offense against the statute of usury, for taking five pounds per cent for that which was incapable of being converted into money's worth up to the extent for which the discount was taken" (*Hammitt v. Yea*, 1 *Bos. & Pul. R.*, 153, note a).

Three years afterward, Lord Kenyon, adverting to this case, said that he knew his opinion had been questioned by mercantile men; but, after all the consideration he had been able to give to the case, he thought it was rightly decided (*Maddock v. Hammett*, 7 Term R., 185).

Soon after this, Lord Kenyon's opinion was canvassed in the English Court of Common Pleas, in a case of discount and remittance, which came before the judges on a motion for a new trial. In adverting to the case with reference to the one before him, Chief Justice Eyre said: "The authority of a case said to have been determined at *nisi prius* has been very properly pressed upon us in the argument. Certainly the opinions of the judge who is said to have decided that case are at all times entitled to the highest respect from me, and from every judge in Westminster Hall; and I will never hastily decide against the advised opinions of that great lawyer. * * * According to the letter of that case, as it has been reported to us, it was said that unless the payment is made in ready money, the transaction is usurious; this would at once put an end to the banker's business" (*Hammett v. Sir W. Yea*, 1 Bos. & Pul. R., 144).

The authority of the case of *Matthews v. Griffiths* may be considered somewhat shaken by the later decisions, and yet it is important as a reference on account of some of its features, and on account of the distinguished ability of the judge who decided it.

The Supreme Court of the State of New York, at Special Term, has held that where a lender received from the borrower a security for the payment of the sum loaned, with interest, and thereupon gave him his check for the amount loaned, less the amount of a note which the lender held against the borrower, which check was payable in six months, without interest, the transaction was usurious (*Lane v. Losee*, 2 Barb. R., 56).

And to the same effect is the decision of the Court of Appeals of the same State, wherein it appeared that a bank, in discounting a note for a customer, made it a condition that he should pay the interest on the note for the full time it had to run, and that he should keep on deposit in the bank a portion of the proceeds until the maturity of the note. The court held it to be a bold case of usury.

Potter, J., in his opinion, said: "If the statute prohibiting usury can be evaded by such a subterfuge as has been offered in this case,

it has become a dead letter, and better be repealed at once. By such a contrivance, an individual or a bank, in the loan of one-half their capital, may draw interest upon the whole. The device in this case lacks even the merit of ordinary skill in its consummation; it is an act of cupidity, an extortion that is not provided with even the decencies of a cloak to cover its nudity" (*East River Bank v. Hoyt*, 29 *How. Pr. R.*, 280, 285; *S. C.*, 32 *N. Y. R.*, 119).

In all these cases it is a question of fact for the jury whether the contract was made fairly and honestly, or whether it was intended merely as a cloak for usury. As for acts of general agency, where money is advanced by an agent, so for the discounting and negotiating of bills of exchange, the law, under certain restrictions, allows a reasonable commission as a recompense for trouble, and a reimbursement for expenses. But the transaction will in no case be upheld when it appears that the compensation or commission was unreasonable, or when the particular form of the contract was adopted for the purpose of enabling the lender of the money to realize more than the legal rate of interest. Every case must depend principally upon the circumstances attending it; and it very seldom occurs that one case of this character will be found which is entirely decisive of another. And yet every decided case may involve principles and discussions which will aid in the determination of others of the same class. The rule is now universally recognized that, for the convenience of traders, a reasonable compensation to bankers and merchants, for the trouble and expense they may incur in the various negotiations incident to paper credit, will be allowed, in addition to the regular interest. But when the trouble and expense are not incurred, then the remuneration cannot be claimed.

A case in point, upon the subject of exchange, has been heretofore referred to, under another head. The case was finally decided by the New York Court of Appeals, wherein it appeared that the borrower of money in New York agreed to pay, for the use of it, seven per cent interest and a part of the difference of exchange paid by the lender (a resident of Savannah, Georgia), on the transfer of the money from Savannah to New York, immediately previous to the loan. The court held that the contract was usurious, and that the notes given for the money so loaned were void. From the fact that the lender's money, at the time of the loan, was in New York when the loan was contracted, the court declared it not a

proper case for any charges on account of exchange (*Jacks v. Nichols*, 5 N. Y. R., 178).

The Supreme Court of Wisconsin has held that an agreement for the payment of exchange in New York upon a note, in addition to the highest amount of legal interest thereon, when the note is made, and is payable in the State of Wisconsin, is usurious (*Towslee v. Durkee*, 13 Wis. R., 480).

The same court held in another case that the provisions of the statute against usury apply as well to banks as to natural persons, and that where a claim for exchange is a mere pretext for the obtaining extra interest, the contract will be usurious (*Durkee v. City Bank*, 13 Wis. R., 216).

And so also the same court held in still another case that where a note is executed in the State of Wisconsin and payable there, the demand and payment of exchange upon New York, as a device to cover the taking of illegal interest, renders the transaction usurious; and in the same case it appeared that A., to obtain from a bank of the State of Wisconsin forbearance on his indorsement of B.'s note, procured and indorsed to the bank a new note of B. for the same amount, and paid a sum greater than ten per cent interest on the same, the court held that the transaction was usurious, and that under the law of 1859 no recovery could be had upon such indorsement, nor upon any subsequent note executed by A. to take up the note so indorsed (*Rock, etc., Bank v. Wooliscroft*, 16 Wis. R., 22).

An important case upon this subject was recently decided by the New York Court of Appeals, and the decision was adverse to the right to the receipt of exchange under the circumstances of that case. The facts were these: In November, 1855, the plaintiff was indebted to the Lyons Bank, a banking incorporation, doing business at Lyons, in the county of Wayne, in the State of New York, in the sum of \$4,000, in three promissory notes payable at the Albany City Bank, in the city of Albany; one for \$1,000, due October 31st; one for \$2,000, due November 6th; and one for \$1,000, due November 8th of the same year. In renewal of the two last named notes for the brief period of twenty-five days, the plaintiff was required to give and did give his new note for \$3,000, payable at the Albany City Bank. He was also required to pay the discount at the rate of seven per cent per annum, and one-half of one per cent for the difference of exchange between Lyons and

Albany, which he paid at the time of the renewal. The transaction was held to be usurious.

Brown, J., in his opinion, said : " The facts present a clear and unequivocal case of usury. It is condemned to this category by the clear and logical argument of the case of *Oliver Lee & Co.'s Bank v. Walbridge* (*supra*), cited in its support ; for if it be an indisputable proposition that a given sum of money is of the same legal and theoretical value in all parts of the State, then whenever the Lyons Bank assumed the converse of the proposition, and took from the plaintiff one-half of one per cent in addition to the legal rate of interest, upon the theory that after the lapse of fifteen or forty-five days a given sum of money at Lyons would not be of the same value as it would be at Albany, it converted what was speculation into absolute reality, and it introduced a vicious element into the transaction which brought it within the prohibition of the statute which forbade of taking of more than seven per cent for the loan or forbearance of money."

Wright, J., in his opinion, said : " The plaintiff made the \$3,000 note, paid the discount at seven per cent on that sum for the twenty-five days, being fourteen dollars and thirty-eight cents, and fifteen dollars in addition, under the name of exchange. Now, if this was not a usurious transaction, it would, in my judgment, be difficult to conceive of one within the statute. The two notes, in renewal of which the \$3,000 note was given, though payable at the Albany City Bank, belonged to the Lyons Bank, and had no value to the Lyons Bank beyond the amount expressed on their face, although payable in Albany (*Oliver Lee & Co.'s Bank v. Walbridge*, 19 N. Y., 134). To obtain a forbearance of twenty-five days for the payment of the \$3,000, the amount of those notes, the plaintiff paid the discount at seven per cent on that sum for the twenty-five days, and fifteen dollars in addition, called exchange, amounting in all to the sum of twenty-nine dollars and thirty-eight cents. This sum was, in fact, paid for the twenty-five days' forbearance, being over fourteen per cent, as the Lyons Bank had no right to demand exchange. That this rendered the whole usurious and void, seems very clear. * * * The \$3,000 note was, therefore, usurious and void, and all the securities which followed and grew out of it in the regular line of descent, including the bond

and mortgage, were void. Usury contaminates all subsequent securities.

“A majority of my brethren, however, are not inclined to go the length of holding that the evidence disclosed a case of usury in law, but are of opinion that the referee, instead of nonsuiting the plaintiff, should, under the proof, have passed upon the question whether the transaction was or was not intended as a device for evading or violating the statute. From this view I am not disposed to dissent” (*Price v. The Lyons Bank*, 33 *N. Y. R.*, 55, 57-60).

CHAPTER XXV.

TRANSACTIONS HELD TO BE USURIOUS — CASES WHERE EXORBITANT INTEREST IS TAKEN UNDER THE FORM OF DISCOUNTS — CASES OF CONTINGENCY OR PROMPT PAYMENT.

It is well settled that both banks and private money lenders are authorized to make discounts; and, hence, they may receive interest, in ordinary cases of commercial paper, in advance, although, strictly speaking, the practice of deducting the interest out of the loan, at the time it is made, deprives the borrower of the use of the whole money for the time the debt is forborne. But, in all cases where more than legal interest is deducted, by way of discount, the transaction is held to be usurious. A few of the leading cases of this character will be referred to.

In the State of Maryland a case came before the courts in which it appeared that A., being insolvent and desirous of raising money, applied to B. and obtained his promissory note for \$250, payable to the said A. in sixty days after date, for the purpose of selling it to raise money. No consideration was paid for the note. A. indorsed the note in blank and sold and delivered it to C., who was ignorant of the important fact that it was a note for \$200. It appeared that B. was in good circumstances. In an action on the note by C. against B., it was held that the note was usurious and void (*Cockey v. Forrest*, 3 *Gill. & Johns. R.*, 482).

A similar case, in principle, came before the Supreme Court of North Carolina and was decided in a similar manner.

The case was this: A. indorsed a promissory note payable to

himself and delivered it to his clerk to sell to B., with directions to conceal from him the fact that the note was A.'s property. The clerk sold the note to B. at a discount of thirty-three and one-third per cent, representing it as his own, and indorsed it to B. without reserve. In a suit by B. against A., it was held that the transaction was usurious (*Ruffin v. Armstrong*, 2 Hawks, R., 411).

And the Court of Chancery of North Carolina has held, that although the sale of a negotiable security for a price less than its value is valid, yet, if a greater discount than legal interest be made, and the purchaser holds the person, from whom he receives it, responsible for its payment, it is, in fact, a loan upon the security, and the transaction is usurious (*Bellinger v. Edwards*, 4 Ired. Eq. R., 449). In the State of New York, however, a transaction of this character is not regarded as usurious. The note would be good for the whole amount as against the original parties; and the assignee of the note, if he guaranteed or indorsed it, would be liable for the amount he actually received for it with interest.

The rule in North Carolina, however, is in accordance with the doctrine of the English courts. In an early case, decided first by Lord Kenyon at *nisi prius*, and then by the English Court of King's Bench, it appeared that a bill of exchange, payable to A. or order, which was legal in its inception, was by A. indorsed to B. for a usurious consideration, who passed it to a third person for a valuable consideration, without notice of the usury, by whom it was paid to B.'s assignees after his bankruptcy, in satisfaction of a debt owing to the bankrupt estate. The court held that the indorsement of A. to B. on a usurious account did not avoid the bill, in the hands of an innocent holder, by virtue of the statute of usury; and that B.'s assignees, being clothed with the right of such innocent indorsee, were entitled to hold the bill against A., although it was expressly held and declared that, as between A. and B., the security was void (*Parr v. Eliassen*, 1 East., R., 92; and *vide Ferrall v. Shaen*, 1 Saund. R., 294; *Cuthbert v. Haley*, 8 Term R., 390).

A similar point was decided in Massachusetts, where, as in England, it was held that usury between the indorser and indorsee, in the transfer of a negotiable promissory note, affects only the promise of the indorser, and cannot be set up as a defense to an action by

the indorsee against the maker (*Knight v. Putnam*, 3 *Pick. R.*, 184; and *vide Foltz v. May*, 1 *Bay's R.*, 479).

But in the State of Connecticut it has been held that the maker of a promissory note, sold by the payee to the indorsee upon a usurious consideration, may avail himself of such usury in an action against him by the indorsee. Although it was declared that the sale of a promissory note, indorsed by the seller, at a discount exceeding the lawful rate of interest, was not necessarily usurious, and that it was incumbent on the party claiming that it was usurious to show the circumstances which make it such (*Eloyd v. Keech*, 2 *Conn. R.*, 175).

A case came before the late Court of Chancery of the State of New York, where, by agreement between A., B. and C., A. and B. were to exchange notes for the same amount, and A. was to sell B.'s note to C. at a discount greater than the legal rate of interest, and the agreement was carried into effect. The court held that the whole transaction was usurious and void (*National Insurance Company v. Sackett*, 11 *Paige's R.*, 660).

In the State of Ohio, the Supreme Court has held that where, under the pretext of discounting an instrument in the form of a bill of exchange, a bank took more than legal interest, the contract was void for usury (*Gilbert v. Sewels*, 9 *Ohio N. S. R.*, 461).

A very decisive case upon this point was recently before the Court of Appeals of the State of New York, wherein it appeared that a note was given without any consideration by the defendants, and proper indorsers procured, with a view of having the same discounted at the bank; and before the note had a legal inception an arrangement was made between the plaintiff and the defendant by which the plaintiff was to discount such note at seventeen per cent, and the note was left with one of the indorsers thereof, who was to receive the money thereon and deliver the note to the plaintiff, which he did. The Supreme Court and also the Court of Appeals held that the transaction was usurious and the note void.

And it was further held and declared that the fact that the plaintiff, at the time of discounting the note, withheld seventeen per cent, and at the same time, without the knowledge or consent of the defendant, gave his own note for ten per cent of the note discounted, which note never came to the possession of the defendant and which he never paid, did not change the character of the transaction,

Potter, J., who delivered the opinion of the Court of Appeals, said: "In carefully looking at the whole case, the report of the referee can be sustained upon the evidence in each of his findings of fact. This being assumed to be true, the conclusion of law is right. If the plaintiff knew, as the evidence justifies the conclusion, that he was discounting this note and not buying a previously negotiated business note, it presents a shameful case of the violation of the statute concerning usury. The judgment is right and should be affirmed" (*Newell v. Doty*, 33 *N. Y. R.*, 83, 94, 95).

In an early case decided by the old Supreme Court of the State of New York, it appeared that A. made a note payable to the defendant or order, which was indorsed by the defendant for the purpose of being discounted at a bank for the accommodation of A. The defendant took the note to the bank to get the same discounted pursuant to the arrangement, but the bank refused to discount it. He then negotiated the note to a third person, who discounted it at a higher premium than the legal rate of interest. When the note became due an action was brought upon it against the defendant as first indorser. The court held that, inasmuch as none of the parties whose names were on the note could, as between themselves, maintain a suit upon it when it became payable, if it had not been discounted, the note was usurious and void.

Spencer, C. J., delivered the opinion of the court, and was very decided that the transaction was usurious, but discussed, principally, questions relating to the admissibility of certain evidence offered on the trial, arriving at the conclusion that a verdict in favor of the plaintiff for the amount of the note should be set aside, and a new trial granted (*Powers v. Waters*, 17 *Johns. R.*, 176, and *vide Munn v. The Commission Company*, 15 *ib.*, 55).

And in a subsequent case before the same court, wherein it appeared that a note was made payable to A. or bearer, though never delivered to the said A., but passed by the maker to one H. as a security for a usurious loan, or rather it was sold to the said H. at a discount from the sum due thereon at the time of the sale, the court held that the note was usurious and void, and laid down the rule that a promissory note has no legal inception until it is delivered to some person as evidence of a subsisting debt (*Marvin v. McCullum*, 20 *Johns. R.*, 288).

In the State of Maine, a case came before the Supreme Court, wherein it appeared that a person holding the note of another,

which was made for his accommodation, passed it to a money lender, who discounted it at a usurious rate of interest, knowing the purpose for which the note was made. The court held that the note not being valid as a contract until negotiation, and therefore the retention of more than the legal rate of interest upon discounting it was usurious (*Tufts v. Shepard*, 49 *Maine R.*, 544).

A case was decided by the Supreme Judicial Court of Massachusetts, in which it appeared that the defendant made his promissory note payable to his own order, indorsed it, and employed an agent to sell it for him. The agent accordingly sold the note for the maker for less than its face to a person who supposed that he was merely purchasing the note in the market, and knew nothing of the fact that the seller was acting only as an agent. The jury, under instructions of the judge in the Superior Court, found a verdict for the plaintiff for the full amount of the note, and the defendant alleged exceptions. The Supreme Judicial Court held that the transaction was usurious, and sustained the exceptions.

Bigelow, C. J., in his opinion, said: "The transaction proved at the trial, by which the note in suit was negotiated to the person who received it as the first holder for value, was in legal effect equivalent to a delivery of the note by the promisor directly from his own hands in consideration of the money advanced to him therefor. It was a loan of money to the defendant on the note. The fact that the money was obtained through an agent of the defendant does not in any degree change or affect the legal character which attaches to the dealings of the parties. Until the note was negotiated by the defendant's agent, it did not become a binding and operative contract, upon which the promisor could be held liable. * * * It is not, therefore, made to appear that any deception or fraud was practiced in the negotiation of the note, or that by the use of due diligence and proper inquiry the person who first advanced the money on the note might not have ascertained the real nature of the transaction. Under such circumstances it cannot be said that there was no loan of money on the note at a usurious rate of interest, unless we are prepared to affirm the proposition that an advance of money to a promisor on his note, through his servant or agent, at a greater rate of interest than is allowed by law, does not constitute usury. Such a doctrine would be inconsistent with first principles, and contrary to the well set-

bled course of judicial decisions" (*Sylvester v. Swan*, 5 *Allen's R.*, 134, 135; but vide *Mitchell v. Oakley*, 7 *Paige's R.*, 68).

And the same learned court of Massachusetts held in a later case that if an accommodation note is disposed of by the payee for less than its face, the transaction is usurious, although the indorser takes it without notice that it is an accommodation note.

Bigelow, C. J., delivered the opinion of the court, and said: "The note did not become an operative contract, binding on the defendants, until it was negotiated by the payee to the broker, who advanced upon it a sum less than the amount due them, after deducting lawful interest. Previous to such negotiation no action could have been maintained upon the note by any one. Such advance of money was in legal effect a loan, and not a sale of a negotiable note in the hands of an indorsee. If a greater rate of interest than six per cent was reserved upon it when it was thus negotiated, the contract was usurious, and the defendants were entitled to a deduction of three-fold the amount of the interest so unlawfully reserved under Gen. Stats., ch. 53, § 4, even in the hands of a *bona fide* indorser" (*Whitten v. Hayden*, 7 *Allen's R.*, 407; and vide *Kendall v. Robertson*, 12 *Cush. R.*, 156).

A quite significant case upon this point was decided by the old Supreme Court of the State of New York just previous to the change in the judiciary of the State under the Constitution of 1846. The action was upon a promissory note made by the defendants, dated April 16, 1841, for \$253.84, and was payable to the plaintiff or bearer in six months from date, with interest. The defense was usury. It appeared that in January, 1840, the defendants gave their note to one Southard or bearer for \$250, payable in one year, with interest, which he transferred to the plaintiff with his guaranty indorsed on it, at a large discount beyond the legal rate of interest. It was not paid up when it fell due, and the note in suit was afterward given for the balance due upon it, in order to take it up. The plaintiff gave evidence to show that when Southard transferred the first note to him, he represented it to be a business note. The judge charged the jury, at the circuit, that the defendants are not liable on the note. The jury found a verdict for the defendants, and the plaintiff moved for a new trial on a case; but a new trial was denied.

Beardsley, J., delivered the opinion of the court, and said: "An accommodation note is invalid in the hands of the person for

whose benefit it was made, and if discounted for him at a usurious rate, it is equally invalid in the hands of the person who thus receives it. The legal attributes of accommodation paper are not changed by a promise, performed or unperformed, to give security for its payment by the person for whose benefit it was made. It is still but accommodation paper. The person for whom it was made cannot collect it. As to him, the maker is but a surety, and if the note is transferred on usurious terms, it is void in the hands of the person who thus receives it" (*Dowe v. Schutt*, 2 *Denio's R.*, 621, 623, 624; and *vide Williams v. Stoner*, 2 *Duer's R.*, 52).

And in a somewhat earlier case, the same distinguished court held that a party who buys an accommodation note, before it has been used for any business purpose, stands in the same situation in respect to the defense of usury as if he were the payee named in the note; and this, though he took the note supposing it to be business paper.

Cowen, J., in delivering the opinion of the court, said: "The notes were given while the provision of the Revised Statutes was in force declaring usurious notes, etc., void, but that this should not extend to an indorsee in *good faith*, for valuable consideration, and without actual notice that the note had been originally given for a usurious consideration (1 *R. S.*, 760, 761, § 5). They, however, had their inception by the act of discount; and the case was, therefore, as if they had been directly payable to the plaintiff on his advance of an usurious loan. The statute does not protect a man who participates in the original concoction of usurious paper; a man who is himself the prominent actor in the usurious transaction. The two cases of *Sauerwein v. Brunner* (1 *Har. & Gill.*, 477), and *Cockey v. Forrest* (3 *Gill & John.*, 483), settle the question. The New York cases were there considered and applied on a course of legislation exactly like ours, the latter case being the same as the one at bar" (*Aeby v. Rapelye*, 1 *Hill's R.*, 9-11; but *vide, contra, Whitworth v. Yancey*, 5 *Rand. R.*, 333).

In the State of South Carolina, an action was brought by the indorsees against the indorser on a note for \$1,878.63, drawn by Brown and Moses, payable to the defendant, and by him indorsed. It appeared in evidence that Brown, of the firm of Brown & Moses, on or about the 24th of December, 1818, borrowed of the plaintiffs the sum of \$3,500; for the use of which, for fifteen

days, he paid \$92.50, being at the rate of sixty-five per cent, or thereabouts; that sometime previous to that, Brown & Moses drew the note in suit, and it was indorsed by the defendant as a friendly act, to enable Brown to pay for certain merchandise which he had purchased, but was never used for that purpose; and when Brown borrowed the \$3,500, for which he paid the usurious interest, he passed away this note, with others, to the plaintiffs as collateral security for the loan. The court held that the note was usurious in its inception, and set aside a verdict for the plaintiffs in the action upon the note, and it was declared and decided, that the fact of the note in the action having been originally intended for a legal purpose could not vary the case, as it was never used for that purpose; that it had no legal existence until passed by Brown to the plaintiffs; that no consideration had ever been paid for it; and that it was in fact no more than a *carte blanche* until put in circulation (*Smith's Administrators v. Payne, Rice's Digest*, 37).

It has been shown in a previous chapter, upon authority, that where a debtor may avoid the payment of exorbitant interest by promptly paying the principal, the excessive interest contingently agreed to be paid will not be usurious; excepting those cases where the abatement may have been intended as a cover for usury. But cases, fixed in this *form*, have sometimes been held to be within the statutes against usury. For example, in the State of Kentucky a case came before the courts, in which it appeared that a judgment had been recovered against a principal and surety; then, upon an agreement, the surety signed the replevin bond, and the principal gave him a note which included the full amount of the replevin bond, with about thirty per cent added to it; and the surety agreed in writing to credit the note with the same amount, provided the principal paid the replevin bond himself. It was, however, agreed in the pleadings that the arrangement was intended not merely to have the effect of a penal bond, but as an indemnity to the surety in case the payment of the replevin bond should devolve upon him. The court held that this was but an agreement for a loan of money in a certain contingency at a future day, upon the understanding that more than the legal rate of interest should be paid for the loan, and that the contract was usurious. It was decided, nevertheless, that the surety might enforce the judgment he had on the note to the amount actually

paid by him in discharge of the replevin bond, with legal interest from the time he paid it. From the balance the principal was relieved (*Moore's Executor v. Vance*, 3 *Dana's R.*, 362).

As a general proposition, it may be affirmed that the original taint of usury attaches to all consecutive obligations and securities growing out of the original vicious transaction; that is to say, it attaches to all renewals of the original security whenever made or given; and it also vitiates every new security into which the original usurious consideration enters.

In one case, decided by the present Supreme Court of the State of New York, it appeared that D. executed his mortgage to secure the payment of a usurious loan. Subsequently the defendant, at the request of D. and without any consideration therefor, made and executed a mortgage upon his land to the lender, as a substitute for the mortgage of D., which was given up and canceled. The court held that the mortgage of the defendant was void for usury. Allen, J., delivered the opinion of the court, and reviewed the authorities; and a liberal extract from his opinion will present an intelligent view of the doctrine upon the subject. The judge says: "The rule is, that any security given in payment or discharge of a usurious security is equally void with this (*Pars. on Cont.*, 396). The original taint of usury attaches to all consecutive obligations and securities growing out of the original usurious transaction; and none of the descendent obligations, however remote, can be free of the taint, if the descent can be fairly traced (*Dunning v. Merrill*, 1 *Clark's C. R.*, 252). It would not have been questioned that the mortgage of the defendant would have been void for usury if it had been given upon the making of the loan and to secure its repayment, and as an original security. And the statute of usury would be very easily evaded if a security of a third person, taken a few days or a few months after the loan, in lieu of the obligation of the borrower, would be valid. A new security of the borrower for the same debt would have been vitiated by the usury, and the obligation of a third person stands upon no better foundation. *Harrison v. Hannah* (5 *Taunt.*, 780), was this: A., being indebted to the plaintiff in ninety pounds, and twenty pounds upon illegal consideration, and in a large sum on usurious loans, in consideration of the plaintiff advancing him £150 more, on legal interest, procured him the defendant's acceptance for £100, £110, and fifty pounds, for securing the whole balance due from A. to

the plaintiff; and it was held that these bills were tainted by the usurious transaction, and could not be enforced against the defendant, the acceptor, to the extent of the debts untainted by usury. Heath, J., says: 'Suppose these acceptances had been given by the son instead of the father. There could be no doubt that they would have extended to the whole, and, therefore, would be void. And if the giving these acceptances by the father could alter the case, it would be a shift or device by which the statutes of usury would be defeated.' That the defendant's mortgage was a security given for the usurious loan is plainly alleged, and was given upon no other consideration, and to secure no other debt. And it is declared in all the books, that every subsequent security given for a loan originally usurious, however remote or often renewed, is void (*Wallace v. Bank of Washington*, 3 *How.*, 62). A change of security, either as to character, form or parties, does not purge the illegal consideration, so as to give a right of action on the new security; as, where a new note, without any new consideration, was given by a third person, a stranger, to take up a note in the hands of the original party to the contract, it is tainted by the illegal consideration of the first note (*Tuthill v. Davis*, 20 *Johns.*, 285). That the new security was a mortgage, rather than a note, cannot affect the question. Neither the renewal of an old, nor substitution of a new security, between the same parties, can efface usury, nor further security, nor a guaranty given subsequently by a stranger (*Brinkerhoff v. Foote*, 1 *Hoff.*, 291; *Ruddock v. Boyd*, *id.*, 294; and see, expressly, by *Hoffman*, Vice-Chancellor, at pp. 306-308). In *Bridge v. Hubbard* (15 *Mass. R.*, 96), which was an action upon a note given in place of the borrower's note given up, Parker, Ch. J., says: 'It is true that the borrower's name does not appear upon this note; but we cannot perceive that this circumstance is essential, when the object and views of the party for whose use the note was made are such as appear in the report of the case. That the parties liable on the note were not privy to the usurious bargain is not a fact of importance, if the true destination of the note was to secure such a bargain made by others for the use of him who was to reap the fruits of the bargain' (*And see Steele v. Whipple*, 21 *Wend.*, 103; *Powell v. Waters*, 8 *Cowen*, 669, 691, 692; *Reed v. Smith*, 9 *id.*, 647). Upon the facts alleged in the answer, the mortgage of the defendant was void for usury" (*Vickery v. Dickson*, 35 *Barb. R.*, 96, 98-100).

Here is a case directly upon the point under consideration, in the decision of which we have a judicial construction of a number of other authorities on the point, which supersedes the necessity of any further reference to the cases examined by the judge in his opinion.

And it has been held by the same learned court, in a more recent case, that, where a bond and mortgage are usurious and void, a subsequent bond and mortgage, for which the former securities constitute the greater portion of the consideration, will also be usurious and void (*McCraney v. Alden*, 46 Barb. R., 272).

So, also, the Court of Appeals of the State of New York held, at an early day, that, where a borrower, on obtaining a loan of money at an illegal rate of interest, assigns to the lender bonds and mortgages, in consideration of such loan, the assignment was void, and that trover might be immediately maintained for them by the assignor (*Schroepfel v. Corning*, 6 N. Y. R., 107).

The Supreme Court of the United States, as early as 1810, in a case wherein it appeared that an agent, who had, by permission of his principal, sold eight per cent stock, applied the money to his own use, and, being pressed for payment, gave a mortgage to secure the payment of the amount of stock, with eight per cent interest thereon, held that the mortgage was usurious (*Butts v. Bacon*, 6 Cranch's R., 252).

In the State of South Carolina, at a very early day, in a case wherein it appeared that a bond had been given to secure the payment of usurious interest by one who died before it was taken up, after his death his friend, who was ignorant of the usury, in order to prevent a lawsuit to recover the sum due on the bond, gave his own bond in lieu of the bond given by his deceased friend. The court held that the second bond was void for usury (*Edwards v. Skining*, 1 Brevard's R., 548).

In the State of Iowa, in a case in which it appeared that money was borrowed at usurious interest, and a part thereof, with the usury, was paid, and a note given at a legal rate of interest for the balance, the court held that the note was tainted with usury; and it was further held, in the same case, that under the Iowa statutes a contract is usurious wherein unlawful interest in any way enters, whatever the nature of the consideration, whether for the loan of money or for the purchase of real estate (*Callanan v. Shaw*, 24 Iowa R., 441; and *vide Campbell v. McHarg*, 9 ib., 354; *Smith v. Cooper*, ib., 376; *Garth v. Cooper*, 12 ib., 364).

In the State of Massachusetts the Supreme Judicial Court has held that it is a good defense to an action by an indorsee against the indorser of a promissory note, indorsed for the accommodation of the maker, that the indorsee received the note as security for the payment of a usurious contract between him and maker (*Dunsmcomb v. Bunker*, 2 *Met. R.*, 8); and the same doctrine has been recognized and adopted by the courts of Missouri (*Vide Weinser v. Shelton*, 7 *Mo. R.*, 237).

In some of the States, negotiable paper, which is usurious in its inception, may be enforced in the hands of a *bona fide* holder. Such was the law in New York prior to the usury act of 1837. Where such is the law, it becomes important to understand who is regarded as a *bona fide holder*.

In an action decided by the old Supreme Court of the State of New York, which was upon a negotiable promissory note dated prior to the act of 1837, the court held that proof that a note was usurious in its inception was sufficient, even as against an indorsee, to cast upon him the *onus* of showing that he paid a valuable consideration for it.

Bronson, J., who delivered the opinion of the court, said: "The statute first declares void all bills and notes infected with usury, and then provides that the relation shall not extend to any negotiable bill or note in the hands of an indorsee or holder who received the same, in good faith, for a valuable consideration, and without notice of the original taint of usury (1 *R. S.*, 772, § 5). It was, I think, enough for the defendant to show, in the first instance, that the note was usurious and void in the hands of the payees. That would cast on the holder the burden of showing that he paid a valuable consideration for the note. Whether it would be necessary for him to go beyond that, and show, also, that he took the note before due and in the usual course of business, or whether the date of the indorsement and the fact of subsequent possession would be sufficient *prima facie* evidence of good faith, is a question which we need not now consider" (*Seymour v. Strong*, 1 *Hill's R.*, 563, 564).

And the same distinguished court held that a party who buys an accommodation note before it has been used for any business purpose, stands in the same situation, in respect to the defense of usury, as if he were the payee named in the note, and this, though he took the note supposing it to be business paper; that such a party is not entitled to be protected as an indorsee or holder in

good faith, etc., within the statute referred to in the opinion of Bronson, J., in the case of *Seymour v. Strong* (1 *Hill*, 563).

Cowen, J., delivered the opinion of the court, and examined the cases at considerable length, coming to the conclusion that the statute did not protect a party who participates in the original conception of usurious paper. He regarded the question settled by authority, and laid down the rule as before indicated (*Vide Aebv v. Repelye*, 1 *Hill's R.*, 9-11).

In respect to what will be regarded a "valuable consideration" within the statute, the same court held that where a bank discounted a note to *extinguish* a debt due it from the holder, or the proceeds are applied *toward discharge* of his liability, such acts were equivalent to *paying value at the time*, and constituted the bank a holder for valuable consideration.

Bronson, J., in delivering the opinion of the court, said: "The note was transferred before the usury act of 1837 took effect. The plaintiffs received it in good faith, without any notice of the usury, and the only question is, whether they paid a valuable consideration (1 *R. S.*, 772, § 5). I think they did. It is not the case of a note received in security for a fraudulent debt, without parting with anything at the time. The note was *discounted* by the plaintiff for the benefit of Ward, to *extinguish* his debt, and the avails went to *discharge* his liability to the bank. I cannot understand this language as meaning less than that the proceeds of the note were actually applied to the use of Ward" (*Bank of Sandusky v. Scoville*, 24 *Wend. R.*, 115, 116).

The foregoing rules respecting good faith and valuable consideration in cases of usury are important to be understood, and perhaps it is as well to refer to them in this chapter as anywhere else. Other authorities might be referred to on this point, but these may be considered sufficient.

CHAPTER XXVI.

TRANSACTIONS HELD TO BE USURIOUS—CASES OF A MISCELLANEOUS NATURE.

A BRIEF reference to some few cases held by the courts to be tainted with usury, but which are not sufficiently marked to be placed under any of the foregoing heads, will close the discussion of the subject in the aspect hereinbefore considered.

A case came before the old Supreme Court of New York, wherein it appeared that on discounting negotiable paper interest was calculated and received upon the principle of 360 days being a year. The court held that this rendered the note usurious.

Sutherland, J., delivered the opinion of the court, and said: "The principal question raised upon the argument of this case was, whether the evidence was sufficient to show that the notes were usurious on the ground of the interest having been calculated and retained upon the principle of 360 days being a year. It was sufficient, *prima facie*, to establish the usury. In the first place, the fact that more than seven per cent was taken was proved, and to repel any presumption which might be indulged that it was taken unintentionally or by mistake, the uniform custom of the company to compute interest upon a principle which would give more than seven per cent was shown" (*The Utica Insurance Company v. Tillman*, 1 Wend. R., 555, 557).

The same court held, in a later case, that a *loan company*, authorized by its charter to loan money upon pledges of goods and chattels, and to charge interest for a *full month*, when the loan is for a period of fifteen days and less than one month, was not entitled, where a loan made for *twenty days* remained unpaid, to demand interest at the same rate for any subsequent time; that the interest on the debt due at the expiration of the twenty days should have been computed as an ordinary contract; and it appearing in the case that after the expiration of *twenty days* interest was charged for a subsequent period at the same rate, and a promise for the payment thereof exacted and made at the same time that a bond was taken for the *sum actually* lent, the court held that the interest thus computed was *usurious*, and that the agreement for the payment thereof, although not included in the bond,

rendered the bond void for usury (*Macomber v. Dunham*, 8 *Wend. R.*, 550).

In an early case before the same court, where a note was given in renewal of a former note and a *premium* or interest above the legal rate was exacted for the renewal, the court held that the new note was usurious and void, although a separate note was given by the maker for the premium. It was declared and held, however, that the antecedent debt was not thereby destroyed.

And where a note so made in renewal, on a usurious consideration, was passed by the defendant to the plaintiff, in part consideration for the sale and conveyance of land, the court held, in the same case, that the plaintiff, who had sued the indorser of the note, and failed to recover, because of the usury, might maintain an action of *assumpsit* to recover the amount on the original contract, the note being a nullity (*Swartwout v. Payne*, 19 *Johns. R.*, 294).

A case came before and was decided by the present Supreme Court of the State of New York, wherein it appeared that the defendant Wilson made a promissory note for \$120, payable to one Upson or bearer. The note was never delivered, but was placed by the maker in his desk as a place of deposit, whence it was stolen by a laborer in the employ of the defendant and transferred over to one Bigelow for \$115. Bigelow was not acquainted with the person who transferred the note to him, but was introduced to him by another man, and was told he had been at work for the defendant. Before the note became due Bigelow transferred the note to the plaintiff, who was his brother-in-law. The court held that the note never had a legal inception for want of a delivery; that the transfer to Bigelow was void for usury, because it was not taken by him *bona fide* for a full and fair consideration, and in the usual course of his business; and for this reason it was held that the plaintiff could not recover on the note.

The court laid down the rule in the case, that a promissory note has no legal inception or vitality until it is *delivered* to some person as evidence of a subsisting debt, and it was declared that, where a note is not a perfect or available security in the hands of the holder, the discounting or purchase of the same at a greater discount than the legal rate of interest renders the transaction usurious and the note void; and this, notwithstanding the trans-

action is in form a purchase of the note of a person other than the maker, who represents it to be a business note, and valid in his hands, and whether the party transferring has authority to do so, or the transfer is tortious; that the ignorance of the person discounting the paper, that it is unavailable in the hands of the party offering it for discount, will not affect the question; and that, where the note is invalid in the hands of the seller, the maker can avail himself of the defense of usury in the negotiation of the note, and the defense will be complete upon establishing the fact that it was transferred at a discount greater than that allowed by law (*Hall v. Wilson*, 16 Barb. R., 548).

This case is important, not only as showing what may constitute usury in a given transaction, but under what circumstances the title of the holder of negotiable securities, which have been obtained fraudulently, feloniously or without consideration, will be upheld or sustained.

The present Supreme Court of the State of New York decided, in a later case than that of *Hall v. Wilson*, that where accommodation paper is bought *bona fide* for a gross sum, which sum, or calculation, gives more than legal interest, the transaction is usurious, and that no recovery can be had against the parties to the note, even for the amount actually paid, with lawful interest; that is to say, if there has been no fraud or false representation, by certificate or otherwise, to mislead the purchaser; and the doctrine was clearly laid down that there is no real distinction, so far as usury in its civil aspect is concerned, between buying and discounting; that the policy of the statute is equally defeated by the one as by the other.

Roosevelt, J., delivered the opinion of the court, and said: "Is there any real distinction, so far as usury in its civil aspect is concerned, between buying and discounting? Is not the policy of the statute equally defeated by the one as by the other? It seems to us that it is. With the wisdom of the policy the courts have nothing to do. It is for them to enforce it, wise or unwise; unless the enforcement, as in the case of certificates, or all representations of commercial paper, conflict with another rule of law not yet repealed, that a man shall not allege, by way of defense, that he himself has been guilty of a falsehood, and is entitled to be rewarded for the offense. The case of certificates or represen-

tations is an exceptional one, and of comparatively recent origin. And even this exception, the adoption of which admits the general rule to be otherwise, although sanctioned by several decisions, has never yet been finally established in the court of last resort. The general rule, just or unjust, that the purchaser of accommodation paper, without such certificate or representation, at a higher rate than seven per cent, takes it at his peril, is too well established to be now disputed" (*Bassange v. Ross*, 29 Barb. R., 576, 578).

The Supreme Court of the State of Alabama has held that a contract between the plaintiff and the defendant in an execution issued upon a judgment, by which the plaintiff agreed to delay enforcing the collection of the execution until the ensuing term of the Supreme Court, that the defendant might take the case up for revision, and the defendant, in consideration of the delay, agreed to pay ten per cent on the amount of the execution, if the case was affirmed, was usurious (*Matlock v. Mallory*, 19 Ala. R., 694).

In a case before the Supreme Court of North Carolina, wherein it appeared that an agreement was entered into, whereby the borrower agreed to pay the lender the same rate of interest which the latter was bound to pay a third person, and which exceeded the legal rate; the court held, that the transaction was usurious (*Dowell v. Vannoy*, 3 Dev. R., 43).

And a case came before the Court of Chancery of the same State, wherein it appeared that a bank in North Carolina agreed to lend to an individual notes of a Virginia bank which were at a depreciation in the market, below both specie and the notes of the bank of North Carolina, and the borrower, by the agreement, was to give his note at ninety days, to be discounted by the bank, and to be paid in specie or in the notes of the bank making the loan. The court held that the note given in pursuance of this agreement was void for usury, though the borrower stated, at the time, that he could make the Virginia notes answer his purpose in the payment of his debts to others (*Ehringham v. Ford*, 3 Ired. R., 522).

The Supreme Court of the State of Iowa has held that a contract to pay a certain sum of money for the extension of time on a note, in addition to legal interest, is usurious; and there can be

no doubt of the correctness of the decision (*Ferrier v. Scott's Administrators*, 17 *Iowa R.*, 578).

The courts of Louisiana have held that, where a certain per cent is charged for money advanced, and conventional interest is also stipulated, the contract is tainted with usurious interest, and that the principal only can be recovered (*Payne v. Waterson*, 16 *La. An. R.*, 239).

In the State of Kentucky the court held, where it appeared that the creditor received his own note, not then due, at a discount of more than legal interest, in payment of a debt due from the payee, that the transaction was usurious. And it was held in the same case that if the purchaser of a note, after the note becomes due, charge the assignee a greater rate of interest than is legal on the sum advanced by him, and it is paid, it is usury, whether the same be paid in money or in notes of third persons (*Young v. Miller*, 7 *B. Monr. R.*, 540).

It is doubtful whether the doctrine laid down in this Kentucky case would be accepted, or the case itself recognized as authority, by the courts of any of the States at the present day. It is not easy to see any difference in principle between the case in Kentucky and the ordinary one of a *bona fide* transfer of business paper, valid in its inception, at a discount from the sum secured to be paid thereby; and it is well settled that there can be no usury in transactions of this kind. But the decision of the Kentucky case was as above stated.

The Supreme Court of the United States, at a very early day, made a decision in strict accordance with the one made by the Supreme Court of North Carolina, in equity, reported in 3 Devereux. The United States Supreme Court decided that if A. lend money to B., who puts it out at usurious interest, and agrees to pay A. the same rate of interest which he is receiving upon A.'s money, the transaction is usurious between A. and B., and an indorsee of B.'s note to A. may avail himself of the plea of usury (*Levy v. Gadsby*, 3 *Cranch's R.*, 180).

It was held by the old Supreme Court of the State of New York that an agreement to pay more than legal interest for money loaned on note, such agreement being made at the time of the loan, is usurious, and renders the note void, though the note on its face be for the mere amount lent, with legal interest only. On the trial in the Court of Common Pleas, the judge charged the jury that

if, at the making of the loan, it was agreed between the lender and the defendant that he should pay more than seven per cent for the use of the money, the defendant would be entitled to their verdict; but if they believed, from the testimony, that the note was given for the amount of money advanced, and the agreement to pay extra interest was made subsequently, with a view to obtain further indulgence, such agreement would not affect the note, and the plaintiff should recover. The jury found for the plaintiff; the Court of Common Pleas refused to set the verdict aside, and the defendant brought error. The Supreme Court did not controvert the legal propositions contained in the charge; but held that the evidence clearly showed that the agreement to pay more than legal interest for the use of the money was made at the time of the loan, and that the court should have so told the jury. The judgment in favor of the plaintiff was, therefore, reversed, and a *venire de novo* ordered.

Savage, C. J., delivered the opinion of the court, and said: "Usury is commonly an unconscionable defense, but it is a legal one; and if proved, courts must sustain it. Usury was, in this case, clearly proved by the testimony of Alfred White; but it is supposed that this was answered by the testimony of Darrow. There is no contradiction between them. Usury consists in the corrupt agreement of the parties, by which more than lawful interest is to be paid. White swears to the agreement, and that the note was given for the amount loaned. Darrow does not disprove the agreement. He corroborates White, as far as he goes. * * * It was proposed to ask a witness in court what he had already sworn. In my judgment, the exercise of a sound legal discretion required a re-examination of the witness. But, independent of this ground (which I think sufficient), I am of opinion that the court should have charged the jury that the inference of law was that the bargain spoken of by Miss Jones to Wilson was the contract of loan. No other had been alluded to" (*Merrills v. Law*, 9 *Cow. R.*, 65-69).

After the decision in the Supreme Court, the plaintiff brought error to the Court of Errors, where the judgment of the Supreme Court was reversed, and that of the Common Pleas affirmed. The latter court came to the conclusion that the Common Pleas put the case correctly to the jury; that the verdict was not without evidence to sustain it; and that it could not, therefore, be legally set aside.

The chancellor, in his opinion, said : "I am inclined to concur with the chief justice in the view he has taken of the merits of the case before the Court of Common Pleas ; but it is evident the attention of the justices of the Supreme Court was not drawn to the fact that the questions of law which might have been raised for the consideration of that court were not presented in a form which could authorize a reversal of the judgment on a writ of error. The defense in the court below was usury, and it is very probable that the strong feeling which always exists against such a defense, together with the fact that it was set up to defeat a recovery on a note given to a young female, may have induced the jury to find a verdict for the plaintiff when they should have found in favor of the defendant. But if no principle of law was violated by the Court of Common Pleas on the trial, neither the Supreme Court nor this court have any power to reverse their judgment on a writ of error."

Mr. Senator Beardsley, in his opinion, said : "Usury is an odious defense, and he who attempts to avail himself of it should be held to strict proof ; and if he has once had a fair trial, and the fact fairly submitted to the jury, to adopt the language of one of our judges in an analogous case, 'he shall not, with my consent, have another.' This, I think, accords with the general view of our courts, when there is evidence on each side and the question fairly a question of fact. * * * The law in regard to usury was correctly stated to the jury by the Court of Common Pleas, and I do not understand the defendant below as excepting to the incorrectness of the charge. If not, it is too late to take exceptions to it in the Supreme Court or in this court" (*Lane v. Merrill*, 6 Wend. R., 268, 273, 274, 279, 280).

The doctrine is well settled, upon the authority of the case last considered, and upon the authority of other cases that might be referred to, that where there is a usurious agreement for the loan of money, pursuant to which a note is given for the actual amount of the money loaned, with legal interest, and the extra sum to be paid rests in parol, or is put into a separate security, the whole transaction will be tainted with usury, and the note given for the true amount cannot be enforced.

The present Supreme Court of the State of New York declared a transaction to be usurious, in which the following were the facts : The defendant in August, 1855, applied to a broker in New York

for a loan of money to the amount of \$10,000. He was told by the broker that this amount could not be obtained upon the securities which he had to offer, being the mortgage in suit, but that, in lieu of cash, notes or obligations payable at a future day might be obtained for such mortgage. These notes could be sold or discounted immediately, and thus the cash, which was the object of the loan, obtained. The defendant assented to the arrangement, and the negotiation resulted in his giving the bond and mortgage, for the foreclosure of which the action was brought by the plaintiff, to whom it was assigned. The bond and mortgage were originally made for the purpose of raising a loan of money, and were conditioned to pay \$10,000 in one year, without interest, and payable to James W. Elwell & Company, and given to them in exchange for their notes for the same amount of \$10,000, payable in six months from the 4th, 6th and 9th of August, 1855, also without interest. At the same time the defendant paid Elwell & Company \$500 as compensation for the advance or exchange of these notes for the mortgage.

The action was brought to foreclose the mortgage, and the defense of usury was interposed. The cause was referred to a referee, who gave a judgment for the plaintiff, and the defendant appealed from the judgment to the General Term of the Supreme Court, where the judgment was reversed and a judgment entered, declaring the bond and mortgage usurious, and dismissing the plaintiff's complaint with costs.

Emott, J., delivered the opinion of the court, and said: "It is unnecessary to discuss, because it is unnecessary to determine here, whether giving one's own note or obligation in return for the note or obligation of another can ever be regarded as a sale of credit. This case presents unequivocally a loan. It was the declared and known object of Fowler to borrow money. He obtained notes payable in six months, which he could dispose of and convert into money at once, and he gave an obligation payable in a year, when he expected to repay the makers of the notes, who would then be the lenders of the money. * * * The notes were loaned and taken as money and in place of money, and were substituted for money by the agreement of the parties.

Upon such a transaction the respective obligations of the parties must be estimated at their nominal value; that is, at the value which they import by their terms. The notes of the lenders were

equivalent to a loan or advance of the money, payable by them at the time when they were due. All which they had a right to exact or receive for the advance of these notes, as and in lieu of money, was interest at seven per cent from the time when they would be compelled or be liable to pay them, until the maturity of the obligation, which they received for them, and by which the borrower was bound to repay them the amount of the advance thus made. By the terms of these securities this would have been about six months; and as the amount was \$10,000, the interest or compensation for the advance would have been about \$350. The defendant's bond and mortgage did not provide for the payment of this or any other compensation, but simply for the repayment, after a year from its date, of the amount which Elwell & Company were to advance, and did advance in six months. But Elwell & Company demanded and received, as a part of the transaction, and as a compensation, for which the referee calls a loan of their notes, the sum of \$500; that is, for agreeing to lend and performing their promise by lending Fowler \$10,000 for the period of six months, they received \$500. I am unable to call such a transaction by any other name than usury" (*Williams v. Fowler*, 22 *How. Pr. R.*, 4, 6-8).

The old Supreme Court of the State of New York held the following transaction usurious: M., to defraud D.'s creditors, gave him his note on time for a horse; D. procured two others to sign it as makers, and before its maturity, J. bought it at a discount beyond the legal rate of interest. J. brought his action against the three joint and several makers to recover the amount of the note, and they interposed the defense of usury. The court held the note to be void for usury (*Johnson v. Morley*, *Lalor's R.*, 29).

And in another case before the same court, it appeared that G. applied to B. for a loan, and B. told him he would let him have the money at ten per cent, on W.'s notes, if he would get them; whereupon G. procured W.'s notes in exchange for his own, and B. purchased them at ten per cent discount. The court held the transaction usurious, and that the notes purchased could not be enforced (*Blodgett v. Wadhams*, *Lalor's R.*, 65). In this case, had G. and W. exchanged each other's notes for equal amounts, without the knowledge of B.; and then G. had sold W.'s note to B. at a discount, W. could not have availed himself of the defense

of usury. But the fact that B. was privy to the whole transaction rendered it usurious.

In the State of Alabama, a case came before the Supreme Court in which it appeared that a contract for the loan of money had been made between the parties, upon which a note and surety was taken, which, by the terms of the note, the money was to be repaid in another State; but there was no stipulation contained in it as to the particular rate of interest to be paid. After the maturity of the note, and the insolvency and death of the borrower, the time for the payment of the money was extended by the sureties upon a new contract, under which a higher rate of interest was charged upon the note, after its maturity, than was authorized by the laws of the State where it was payable. The court held that the transaction was usurious (*Ely v. McClung*, 4 *Porter's R.*, 128).

The following English case is given by Mr. Comyn in his work on Usury, which, he says, occurred while his work was in press: Crocker, desiring to raise money, came to Lanham; and it was agreed between them that Lanham should buy of Crocker a debt due to him from the Duke of Norfolk, which exceeded the amount of the sum advanced by Lanham and legal interest thereon. In the deed of transfer, it was made a condition that, if the duke did not pay the debt within three months, Crocker should pay it, together with all costs and charges incurred. Upon the trial at Henshaw, before Mr. Sergeant Bosanquet, it was proved to have been a sale, and not a loan; and that the above condition was inserted by the advice of Crocker's conveyancee. The learned sergeant left it to the jury to say whether this was a usurious contract; and they found that it was. On an application for a new trial, the Court of King's Bench refused the rule, intimating their opinion that the contract was usurious on the face of the deed (*Com. on Usury*, 287).

A very important case came before the Supreme Court of Pennsylvania quite recently, in which the transaction was held to be usurious under the laws of that State. The action was brought to foreclose a mortgage upon certain coal lands, and other lands, made to secure the payment of \$43,200, with legal interest. The consideration of the mortgage was the purchase-price of the coal lands, and a loan of \$18,000 in money. The defense was usury, in that the mortgagee was compelled to buy the coal lands, which

he did not want, at an exorbitant price, in order to obtain the loan of \$18,000, to relieve himself from pressure, and to save from sacrifice real estate of his own, part of which was of great value but unproductive.

On the trial before the jury, evidence of the negotiation which led to the bargain, the condition and circumstances of the mortgagor, the character and market value of the coal lands, as well as the papers executed between the parties, were held to be appropriate proofs to maintain the issue, and were laid before the jury. The jury found for the plaintiffs, and assessed the principal and interest unpaid on the mortgage at \$42,682.87. But the jury further found that, in point of fact, the mortgage sued on was given to secure the payment of a loan of money at a rate exceeding that established by law, and that, deducting such excess from the mortgage debt, the amount of the principal and interest of said mortgage debt actually unpaid was \$25,799.24. Subsequently, on consideration of the reserved points, the court *in banc* ordered the entry of judgment for plaintiffs for the \$25,799.24, with interest from the date of the verdict. The plaintiffs thereupon removed the case into the Supreme Court, where the judgment for the lesser amount was affirmed.

Woodward, J., delivered the opinion of the court, and said: "It was as essential to the legal idea of usury, under the statute of 1723, that it should be contracted for, as it is under our present statute. And courts of justice, to get at the real nature of the contract, would look beyond the forms in which the parties had clothed it, to those extrinsic circumstances which would reveal the corruption of the contract. This was done in *Scott v. Lloyd* (9 *Peters*, 418); *Evans v. Nagley* (13 *S. & R.*, 218); *Chamberlain v. McClung* (8 *W. & S.*, 31).

So, in construing the English statutes against usury, it was always held that no contract, however framed, however unlike a contract for a loan or for interest it might apparently be, would hold good, if the ultimate effect of it would be to secure more than the legal rate of interest for the loan of money. Mr. Smith, speaking of the statute of 12th Anne, ch. 16, in his work on Contracts, 154, says, every conceivable means was used to evade the statute. Sometimes a transfer of stock, sometimes commission on a discount, sometimes a substitution of one contract for another, or several concurrent contracts were resorted to; but the effort of

the court was in every case to strip off the external covering of form, and get at the intent and real import of the transaction, and if that were tainted with usury the contract was held void. * * * We see nothing in the bills of exception to evidence of which the plaintiffs have any reason to complain. They must allow the transaction to be thoroughly investigated. The law will be satisfied with nothing else. * * * It is impossible for us to doubt, now with the verdict before us, that this was a case within the purview of the act of 1858" (*Fitzsimmons v. Baum*, 44 Penn. R., 32, 40, 42).

And another case may be referred to which was declared to be usurious by the present Supreme Court of the State of New York. Prior to the act of 1851, chapter 122, authorizing the creation of building associations, a building association had been organized, and in 1849 the plaintiff became a member thereof. The articles of association provided for the "redemption" of its own shares from those members who were willing to accept the lowest price for them. The plaintiff "redeemed" his shares to the association, in accordance with the articles, and thereby agreed for a loan of \$3,500 by the association to him, to pay eighty-four dollars per month until the shares of the association should be worth \$600 each, and he secured the payments by bond and mortgage on real estate. By a calculation made it appeared that the shares would not probably attain that value in less than from five to eight years, and would be likely to be longer than that time in reaching that value. It also appeared that the payment of eighty-four dollars a month would pay the amount of the loan, with legal interest, in about four years. The court held this to be substantially a loan of money, and that the securities given were void for usury, and must be canceled.

Bonney, J., delivered the opinion of the court, and said: "Upon these facts I am forced to the conclusion that these several transactions between the plaintiff and the building association, upon which the said mortgages and agreements were made, were intended to be loans of money to the plaintiff at a rate of interest exceeding seven per cent per annum, and that such mortgages and agreements are consequently usurious and void;" and the judgment rendered to that effect at Special Term was affirmed (*Melville v. The American Benefit Association*, 33 Barb. R., 103, 114, 116).

Other cases might be referred to, but probably those already considered will be found to cover almost every conceivable case of usurious transaction that is likely to arise.

CHAPTER XXVII.

GENERAL SUMMARY OF THE CASES EXAMINED — THE DOCTRINE OF THE COURTS IN RESPECT TO ALLEGED USURIOUS TRANSACTIONS.

HAVING examined a large number of cases in which the subject of usury was involved and discussed, and in which a variety of transactions have been declared by the courts as either subjected to or exempted from the taint of usury, it will be useful and convenient to group together the sum of the cases, in order to ascertain the settled rules by which a usurious transaction may be determined.

At the time that Mr. Comyn brought out his little treatise on Usury in 1817, comparatively few cases had arisen in the English courts involving the question, and he aimed to go through with all the cases then extant. He says : "I am only aware of having omitted one case, the principle of which is not very intelligible ; and as it only arises upon an unsuccessful objection at *nisi prius*, no great stress need be laid upon it. The sum of it is, that if a defendant undertakes to pay the plaintiff the difference between taxed costs and costs out of pocket, in consideration of time given for paying the debt recovered and costs, it is not usury, *Barnett v. Stone*, 3 *Esp. N. P. C.*, 209 ;" (*Com. on Usury*, 155, note b).

The doctrine of the cases examined by Mr. Comyn, so far as it extends, is about the same as of the later decisions ; and those cases are pretty generally recognized as authority at the present day. And, according to all of the authorities, the ingredients of a usurious transaction are, as they are laid down in previous chapters of this work, so that it may be affirmed that to constitute usury there must be, in the first place, a loan, either express or implied ; and, according to the decisions in New York, the statute is applicable only to those loans which are, in substance and effect, loans of money.

But it has been declared that the word "loan," in this connection, must not be too strictly construed, for there are many cases

among those hereinbefore considered, in which no loan originally occurred, yet, by some subsequent agreement between the debtor and creditor, usury was held to have been generated. And Mr. Comyn well says that it should always be remembered that the statute lays stress upon the word "forbearance," as well as upon the word "loan." And however some of the older cases have been construed, it appears clear, from the modern authorities, that where money is owing upon any kind of contract, and forbearance is given for such debt upon the condition of receiving more than the legal rate of interest, such forbearance is as much usury as if the sum of money had been absolutely *lent* upon a contract to pay more than legal interest. "It is not necessary" (says an ancient authority) "to the creation of a loan that money should be paid on the one hand and received on the other; for the circumstance of a man's money remaining in another's hand, in consequence of agreement made for that purpose, will equally constitute a loan" (*Hoger v. Edwards, Cowp. R.*, 113).

In such case, however, it is necessary that the debt be absolutely incurred, and not merely resting upon an executory agreement, the execution of which depends upon circumstances that may take effect (*Spurrier v. Mayoss, 4 Br. Ch. R.*, 28).

But, though forbearance upon a debt incurred by any legal means will give equal room for usury, a distinction must be made between a loan and a sale. For there can be no usury in a sale of any description, provided it be real and not intended as a cover for taking exorbitant interest. In case of an actual sale, the mere circumstance of inequality of price will never bring the transaction within the statute. And this rule applies as well to the sale of "credit" as to sales of property, choses in action and the like. The cases show that usury cannot be predicated of the use which one person may be allowed or authorized to make of another's credit, because credit, a "capacity of being trusted," is neither money, bonds, nor a chose in action. Credit may be a benefit to the possessor as a means of procuring property, but is not itself recognized as property by the law. It cannot be loaned, for a loan implies that the thing borrowed is to be returned, after a temporary use, to the owner, in specie or in kind. The credit of one person may be made available to another by gift or sale, and in no other way. Its value depends upon opinion, and is, of all other things, perhaps, the most capricious and fluctuating. But a

sale of credit is no more within the prohibition of the statute against usury than a sale of merchandise; and no transaction that is in good faith a sale can be usurious, because the important element of a loan is wanting as one of its ingredients. And, as before suggested, the New York courts hold that the statute of usury of that State applies only to a loan of money, or to a transfer of something else as money, or for the purpose and as a means of obtaining money on time. Every loan which falls within the New York statute is, therefore, virtually, if not in form, a loan of money; and the same rule is recognized in most of the other States. Such loans are *express* where the money is advanced by the lender, and *implied* where something else is parted with for the purpose of obtaining money. And it has been repeatedly held that every such transaction, the real object being to procure money on time, no matter what form it is made to assume, is a loan within the statute of usury.

It often happens that the transaction assumes the form of a sale or exchange, when, in point of fact, it is a loan in disguise; in which case it is always held to be within the intent of the statute. A loan may be disguised in the form of a sale of goods or other property; and it has been held that a transfer of debt and credit, time being given, is a loan. So there may be a loan, part in money and the residue by a sale of property; or a loan disguised by a sale of an annuity; or a loan made in terms at legal interest, but usury disguised in the form of dry exchange; or the loan may be made at legal interest, in terms, when the usury is reserved in some collateral matter; or usury may be disguised in the sale of depreciated paper at par. All these peculiarities relating to the matter of a loan are fully illustrated by the authorities hereinbefore examined. And in the language of Lord Mansfield, "in all questions, in whatever respect repugnant to the statute, we must get at the nature and substance of the transaction; the view of the parties must be ascertained, to satisfy the court that there is a loan and borrowing; and that the substance was to borrow on the one part, and to lend on the other" (*Floyer v. Edwards, Cowp. R.*, 112). The authorities considered also show that whenever the transaction is in the form of a sale, and it is alleged that it is a disguise for a usurious loan, the party impeaching it must, by evidence, remove the covering, and exhibit the transaction as a loan of money. And it sometimes happens that parties adopt the form

of a sale, when in truth the real transaction is a mortgage to secure a usurious loan; and there is frequently great difficulty in determining whether a contract was intended by the parties as a mortgage or as a conditional sale. In such cases it seems to be a general rule that where the agreement is made upon an application for the loan of money, the court, for the purpose of preventing usury and extortion, will construe the agreement to be a mortgage, in case the person to whom the application for a loan is made agrees to receive back his money and interest, or a larger sum, and to reconvey the property within a specified time, whatever form the writings may be put in, if the real object appears to have been a loan of money. In such case, also, the relative values of the property and of the price actually paid or advanced are to be taken into consideration, to determine the intent of the parties (*Vide Robinson v. Cropsey*, 6 *Paige's R.*, 480).

So, also, it may sometimes happen that the transaction may assume a form which may induce suspicion, though the parties may have been very wide of any usurious intent. In such case the question of a culpable intention must always be open to the opinion of a jury; while it is the exclusive province of the court to decide as to the legality of the transaction itself. When more than the legal rate is received or bargained for by the terms of the contract, no doubt can exist as to the fact, and it matters not whether the parties knew that they were engaged in a usurious transaction or not; it is all the same; but where a contract has been made which, though it be of a suspicious aspect, may yet by possibility be fair and honest, it will be necessary to call upon a jury to determine its character; and the authorities prove that where a transaction is susceptible of two constructions, one favorable to the innocence of the parties and the other against its legality, the transaction will be upheld.

The authorities examined clearly hold, also, that usury can never be predicated upon a loan of chattels, unless the transaction is a cover for a loan of money; if the transaction is proved to be a disguise, as in some of the cases examined, then it may be declared usurious. And the only criterion by which to detect usury, where anything other than money is loaned, is the market value of such thing, and the consequent gain to the lender in charging or obtaining more than such value (*Vide Mumford v. The American Life Insurance and Trust Company*, 4 *N. Y. R.*, 463). If the court,

in looking at the whole transaction, can see that the value secured to the vendor was in good faith but the price of the thing sold or exchanged by him, there can be no usury, whatever the price may be, or the mode of its reservation; but, where the object of the parties is a loan of money, and something else is substituted for it, under the form of a sale or exchange, the principal of the loan is held to be the value in money of the thing substituted, and any consideration paid or reserved beyond such value will be considered as interest for forbearance (*Vide Dry Dock Company v. The American Life Insurance and Trust Company*, 3 N. Y. R., 344). But the doctrine of all the authorities examined is that, in order to constitute usury, the first requisite is that there be a loan, express or implied.

Again, it may be affirmed, upon the authorities considered, that in order to constitute usury there must be, in the second place, a contract or understanding that the money loaned shall be returned at all events, without substantial contingency or hazard. For, if the return of the principal with interest, or of the principal only, depend upon a contingency, there can be no usury; because that which may never be received cannot be said to be forborne for any given time. But if the contingency extend only to the interest, and the principal be beyond the reach of any hazard, the lender or forbearer can, in such case, lay no claim to interest above the legal rate, without, as a general rule, being guilty of usury; although a distinction is to be observed between a contingency merely affecting the interest, and an option which the debtor has of defeating the payment of interest by a performance of some act stipulated for at the creation of the contract; for, when such option is given, and the creditor either neglects or refuses to avail himself of such condition, the law insists upon his paying such additional interest, as a penalty for his neglect or refusal. This doctrine is abundantly illustrated by the authorities examined.

Upon the consideration of the hazard which affects the principal, the advance of money by way of insurance, bottomry, *post obit*, or annuity has been sanctioned by the courts. But in all these cases it must appear that no usurious transaction is concealed beneath such as are thus favored by the law, for then no favor will protect the contract; the substance must be taken into consideration; and any usurious intention will vitiate an insurance, or bottomry, or *post obit* or an annuity, as much as if there

had been no such disguise assumed by the contract. Among the cases examined will be found transactions in the form of insurance, bottomry, *post obit*, and annuity, some of which have been upheld as being free from the taint of usury, and others which have been declared to be simple shifts, or disguises for the purpose of concealing the taking of illegal interest, and hence usurious. But all the authorities agree that to constitute usury there must be a loan, and that it is essential to a loan that the principal must, at all events, be returned. No particular rules in this regard, by which the character of the transaction is to be determined, can be extracted from the cases; and yet an examination of the cases hereinbefore referred to will enable the student or the practitioner to ascertain the view which the courts have taken of transactions in the form of hazard or contingency. Especially will he have the benefit of the judicial discussions upon the subject, and the rules which have been laid down by which bottomry and the like may be determined, where the money lent is at the risk of the lender, or the repayment of the principal is at hazard, so as to enable the lender to take more than the legal rate of interest, and not come within the provisions of the statutes against usury.

So also it may be affirmed, in the third place, upon the authorities considered, that in order to constitute usury there must not only be a loan and a contract that the money loaned shall be returned at all events, but that it shall be returned with more than legal interest.

This illegal or exorbitant interest may not be received or reserved in the *form* of interest necessarily. The authorities show that it may be included in the principal secured, or it may be paid or agreed to be paid as a distinct bonus; and the various ways by which this result may be attained are fully disclosed in the authorities examined. For example, where, upon the loan of money at an illegal rate of interest, separate notes are taken, one for the sum loaned with legal interest, and the other for the excess of interest, both notes are infected with usury. Or where, on such loan of money at an exorbitant rate of interest, a note is given for the sum loaned with lawful interest, and the excess of interest is agreed to be paid by parol, the whole transaction is usurious, to the same extent as though the whole, principal and unlawful interest, had been secured in one note or other security.

So also the authorities show that illegal interest may be reserved

in the sale of personal property, chooses in action, in the transfer of stock, and in the exchange of personal securities. Indeed, it matters not as to the form the transaction assumes, provided the result is that the lender by the agreement, in fact, reserves to himself more than the legal rate of interest for the use of his money, it is all the same; if the transaction contain the requisites of usury, it will be considered usurious. The question in every such case is, whether the lender gains more than the lawful rate of interest for the use of his money.

Yet it fully appears that, where trouble or expense or inconvenience is sustained by the party advancing the money, the law allows of a reasonable compensation for this, in addition to the interest becoming due; as in the case of brokerage, or in the negotiation of bills of exchange. And though a slightly excessive interest may be received where the lawful interest is paid in advance by way of discount, or is received before the expiration of the time for which the principal is forborne, yet the mercantile custom of discounting bills of exchange has long been sanctioned by the courts; that is to say, unless in a given transaction the doctrine is carried into the extreme, so as to enable a party to advance and receive a large sum of money without any adequate forbearance; and this more especially where the character of the parties is other than mercantile. By the older authorities, it appears that, on discounting commercial paper, none but banking institutions could exact the payment of interest in advance; but the later authorities have well settled the principle that, upon the discounting of commercial paper not having a longer time to run to maturity than the notes and bills which are usually discounted by bankers, interest on the whole amount of principal agreed to be paid at maturity, not exceeding the legal rate, may be taken in advance. The doctrine which these authorities establish is at variance with the natural reading of the statute, and the practice which it sanctions seems to stand altogether upon the ground of judicial decision; and yet it does not stand less firmly than it would do if it had the sanction of legislative authority. At all events, the principle is well established by the decisions, and has been uniformly acted upon for a period of over fifty years, and during that time has been frequently affirmed by the highest courts of the country.

And so, also, it may be affirmed, in the fourth and last place,

upon the authorities examined, that in order to constitute usury there must be a corrupt intent to take more than the lawful rate of interest for the use of the money loaned. This corrupt intent is declared by the authorities to be really the gravamen of the offense of usury, without which no usury can exist; and this is not unfrequently the most important subject of inquiry in the case. The authorities examined establish the principle that the agreement to take more than lawful interest must be with the full consent and knowledge of the contracting parties; otherwise it cannot be said that there was a corrupt intent to evade the statute. To constitute usury there must be an illegal agreement, and the authorities clearly show that this cannot be predicated of a case in which the excess of interest was the result of accident or inadvertance, without any knowledge that more than the legal rate was secured by the contract. Upon this principle, a mere mistake in calculation is never held to be usury. The authorities uniformly hold, however, that where a transaction is entered into, which is, in point of law, usurious, it will not avail the parties that they were ignorant of the law, provided they entered into the contract with their eyes open. It is only excusable mistakes of *fact* that will justify the agreement to reserve more than legal interest; and some of the cases hereinbefore referred to have held the contracts involved to be usurious in law, whatever the intention of the parties may have been proved to be. But nothing short of a corrupt and illegal contract in violation of the law will constitute usury; and, hence, there can be no usury where the contract is not, in point of fact, what the parties designed it should be. And the authorities show that this principle is carried to the extent that both parties must be implicated in the corrupt intent to evade the law. It is not enough that illegal interest is reserved with the knowledge and intent of the lender simply; both lender and borrower must be cognizant of the *facts*, and intend the effect, of the agreement which they have entered into; and this corrupt intent of the parties is always a question of fact for the jury, or of the court trying the case in place of a jury. The authorities examined also demonstrate that when a contract for money, legal and innocent in itself, is once made and consummated, it cannot be made usurious and illegal by any subsequent transactions of the parties. These subsequent transactions may of themselves be illegal and forbidden by law; but they cannot impart the taint and the consequences of usury to

an antecedent agreement fair and just and upright in itself. If the obligation under it is to pay a debt, the obligation, with the legal rights resulting from it, remain in all their force, and cannot be discharged by engrafting upon it some subsequent agreement obnoxious to the charge of usury. If the subsequent agreement has the effect to annul and rescind the antecedent contract, that is quite another thing; and yet such a case very seldom occurs. And so long as the antecedent contract remains in force, usury cannot be imparted to it by the subsequent agreement. And hence the authorities show that when a usurious security has been given to take up an antecedent security which was valid in its inception, and an action is brought upon it, to which the defense of usury is interposed, sometimes the plaintiff will be defeated in his action upon the usurious security, but permitted to recover, *in the same action*, upon the original contract which constituted the consideration of the one held to be tainted with usury.

The authorities examined also settle the rules by which interest must be calculated, and the time which constitutes the year, and the aliquot parts of a year; and show in what cases the transaction will be declared usurious, because the parties may have reserved interest in violation of these rules. They also declare that every instrument which upon its face reserves more than legal interest is *prima facie* usurious; but even in those cases it is sometimes held that it is competent for the plaintiff to repel this *prima facie* evidence of a corrupt agreement by proving that more than the legal rate of interest was reserved by mistake, and contrary to the intent of the parties; and in some instances where a trifle more than the legal interest has been reserved by the instrument, the courts have held the transaction free from usury, upon the maxim, *de minimis non curat lex*.

The foregoing are the principal points settled and illustrated by the authorities examined; but the points are elaborated, and every aspect of the question will be found to be discussed in the opinions, and the doctrine of the cases has been extracted in the consideration of them in the preceding chapters,

CHAPTER XXVIII.

HOW USURY LAWS ARE CONSTRUED BY JUDICIAL TRIBUNALS—
DIFFERENCE BETWEEN REMEDIAL AND PENAL STATUTES—USURY
LAWS, SOMETIMES PENAL AND SOMETIMES REMEDIAL, AND ARE TO
BE CONSTRUED ACCORDINGLY—THE CONSTRUCTION MUST BE SEN-
SIBLE—USURY LAWS NEVER RETROACTIVE.

In some respects laws against usury are regarded as peculiar, and they are viewed by the courts in a little different light than are the enactments relating to many other subjects. It may therefore be well to note, in a few brief passages, the manner in which these statutes are construed by the courts.

It has been shown, in a previous chapter, that the general rule in respect to the payment of interest is, that it is to be paid on contracts, according to the law of the place where they are to be performed, in all cases where interest is expressly or impliedly to be paid; so that the question whether a contract is usurious or not, depends not upon the rate of the interest allowed, but upon the validity of that interest in the country where the contract is made and is to be executed. And a contract made in one place and payable in another may be made to draw interest according to the legal rate in either place. In a word, it may be laid down, as a general rule of the common law that the *lex loci contractus* will govern, as to the rule of interest, in accordance with the doctrine of the civil law. But if the place of payment or of performance is different from that of the contract, then the interest may be validly contracted for at any rate not exceeding the rate allowed in either place. The rule and all of the embarrassments found to attend it was fully considered in the appropriate place, and it is not needful to dwell upon the subject here (*Vide ante ch., 7*). But, with respect to the construction to be put upon the different statutes of usury, very little has been said; and some remarks upon that particular phase of the subject may be proper in this place.

It has been truthfully remarked that there are subjects of legislative regulation where no one, from reading the statutes, could even *guess* what was the actual state of the law on those subjects. It is a fact that the courts have sometimes gone very far toward taking the place of law-makers; and occasionally the provisions

of the laws against usury have been construed in such a way as to well-nigh destroy their effect. But it is best first to affirm that at the present day the current of authority is in favor of reading statutes of usury, as well as all others, according to the natural and most obvious import of the language, without resorting to subtle and forced constructions for the purpose of either limiting or extending their operation. It seems to be now understood that courts cannot correct what they may deem either excesses or omissions in legislation, nor relieve against the occasionally harsh operation of statutory provisions, without the danger of doing vastly more mischief than good. This is, certainly, the appropriate sphere of action for every court. Where the plain and unequivocal language of the law is rigidly followed, there are, to be sure, a few cases of hardship; but let it be once understood that statutes are not to be limited in their operations by over refined and artificial interpretations, men are able to understand and govern themselves by the law of the land, and an incalculable amount of legal controversy is thus avoided.

In the construction of a statute, it depends much whether it is remedial or penal. Remedial statutes are those which are made to supply such defects, and abridge such superfluities in the common law as arise either from the general imperfection of all human laws, from change of time and circumstances, from the mistakes and unadvised determinations of unlearned (or even learned) judges, or from other sources whatsoever. Penal statutes are those which subject or render the party liable to a penalty for a violation of its provisions.

Statutes that are remedial and not penal, the courts hold are to receive an equitable interpretation by which the letter of the act is sometimes restrained and sometimes enlarged, so as more to meet the beneficial end in view, and prevent a failure of the remedy. They are always construed liberally, and *ultra*, but not *contra*, the strict letter. Penal statutes must be construed strictly. So rigidly has this rule been adhered to that an ancient English statute having enacted that those who were convicted of stealing *horses* should not have the benefit of clergy, the judges conceived that this should not extend to him that should steal but one *horse*, and, therefore, procured a new act for that purpose in the following year. Since that, however, it was decided that when statutes use the plural number, a single instance will be compre-

hended. Thus, an English statute enacted that it should be felony to steal any bank notes, and it was determined that the offense was complete by stealing *one* bank note (*Hassel's case*, *Leach's Cr. Law*, 1).

If a statute inflicts a penalty for doing an act, the penalty implies a prohibition and the thing is unlawful, though there be no prohibitory words in the statute. And this rule has been applied to the case of a statute inflicting a penalty for making a particular contract, such as a simoniacal or usurious contract; and Lord Holt held that the contract was void under the statute, though there was a penalty imposed for making it (*Bartlett v. Viner*, *Carth. R.*, 251; *S. C.*, *Skinnier's R.*, 322).

The principle is now settled that the statutory prohibition is equally efficacious, and the illegality of a breach of the statute the same, whether a thing be prohibited absolutely or only under a penalty (*Vide Bursley v. Bignold*, 5 *Barn. & Ald. R.*, 335; *The State v. Fletcher*, 5 *N. H. R.*, 257; 1 *Kent's Com.*, 467).

The statutes of usury in some instances are strictly penal, and in others not. In those States where the reserving of usurious interest involves, by way of penalty, the loss of the whole debt, or even the lawful interest upon the principal, the statute is penal, and must be construed like other statutes which are penal in their nature; although it has been declared by judicial authority that the rule giving to defendant, in favor of life or liberty, the benefit of every reasonable doubt, should not be extended to civil actions in cases of alleged usury (*Porter v. Mount*, 45 *Barb. R.*, 422, 427).

Whenever usury is an offense, it is so because it is *malum prohibitum*, rather than *malum in se*. But it is declared that the distinction between statutory offenses, which are *mala prohibita* only, or *mala in se*, is now exploded, and a breach of the statute law, in either case, is equally unlawful, and equally a breach of duty; and no agreement founded on the contemplation of either class of offenses will be enforced at law or in equity (*Aubert v. Maze*, 2 *Bos. & Pull. R.*, 371; *Cannon v. Bryce*, 3 *Barn. & Ald. R.*, 179; *Daniels, ex parte*, 14 *Ves. R.*, 191).

A very important case came before the Circuit Court of the United States for the district of Maryland, and was decided by the learned chief justice of the United States Supreme Court in 1857, which involved the construction of legislative enactments upon the subject of usury; and on account of the distinguished

ability of the jurist who decided it, as well as the novel character of the case, a full statement of the authority may well be inserted in this place.

The action was brought by the indorsee of a bill of exchange, drawn upon the defendants, and accepted by them, for \$1,000. The defendants pleaded that the bill was given to secure the payment of money loaned by the plaintiff to the payee of the bill, upon which an interest exceeding the legal rate was reserved; and that such contract was usurious, and the plaintiff not entitled to maintain an action upon it. To this plea the plaintiff demurred; and the question submitted to the court on the pleadings was, whether under the Constitution of Maryland, adopted in 1851, an action could be maintained upon a contract for the loan of money, where an interest of more than six per cent was reserved or received.

In order to understand the decision of the court, it is necessary to observe that the Constitution of the State contained a clause in the following words: "That the rate of interest in this State shall not exceed six per cent per annum, and no higher rate shall be taken or demanded; and the legislature shall provide by law all necessary forfeitures and penalties against usury" (*Const. of 1851, art. 3, § 49*).

By the third article of the declaration, all acts of Assembly in force on the first Monday in November, 1850, which had not expired at the adoption of the Constitution, and were not altered by it, were continued in force, subject, nevertheless, to the revision of, and amendment and repeal by the legislature of the State. The acts of the Assembly, material to the question, which were passed previously to the adoption of the Constitution, were those of 1704 and 1845. The first section of the act of 1704 declared that no person should exact or take above the rate of six per cent per annum, upon the loan of any money, goods or merchandise, or other commodity, to be paid in money; the second section declared that all contracts by which a higher rate of interest was received should be void; and the third section inflicted penalties for taking or receiving more than the rate of interest limited by that act. The provisions of this law were materially changed by the act of 1845; by that act the lender was entitled to secure the amount actually loaned, with six per cent interest upon it, although

the contract was usurious, and stipulated for a higher interest, and it repealed altogether the third section of the act of 1704.

The act of 1845 was still in force when the Constitution was adopted, and the point in issue between the parties, upon the demurrer, was whether the provisions of this act were inconsistent with the clause of the Constitution before recited, and therefore repealed by it. This recitation presents fairly the question before the court in the case.

Taney, C. J., in his opinion, said: "In determining this question, the wisdom or policy of usury laws is not a subject for the consideration of the court; that was a question for the people of Maryland, when they adopted the Constitution. It is the duty of the court to carry into effect the provisions of that instrument according to its true intent, to be gathered from its own words; and referring to the previous legislation of the State only so far as it may contribute to illustrate the meaning of doubtful or ambiguous language, if any such be found in the Constitution, and to ascertain what previous acts of Assembly are still in force. It would be difficult, we think, to raise a doubt as to the meaning of the prohibitory part of the section of which we are speaking. It declares 'that the rate of interest shall not exceed six per cent per annum, and no higher rate shall be taken or demanded.' These words are free from all ambiguity; they prohibit in plain, positive and direct terms the taking or demanding of more than six per cent interest; and on this point it refers nothing to future legislation. The Constitution itself makes the prohibition, and all future legislation must be subordinate and conformable to this provision. Whoever takes or demands more than six per cent while this Constitution is in force, does an unlawful act; an act forbidden by the Constitution of the State. Nor do the words which follow qualify or restrain, in any degree, the meaning of the words above quoted; they declare that 'the legislature shall provide by law all necessary forfeitures and penalties against usury.' Now, usury consists in taking an interest for money above that allowed by law; the taking of more than six per cent, is therefore usury; and the words last quoted treat it as an offense, and direct the legislature to punish it with penalties and forfeitures. The words do not merely give the power to punish; they are mandatory, and make it the duty of the legislature to punish disobedience to that provision by forfeitures and penalties.

Certainly, if the taking or demanding of more than six per cent was not intended to be absolutely prohibited by the preceding part of the section, there would be no propriety in commanding it to be punished.

“The words last quoted, therefore, do not qualify or restrict the meaning of the preceding words; on the contrary, they show that the framers of the Constitution, after fixing the amount of interest which a party might lawfully take or demand, proceeded to make that provision more effectual by requiring the legislature to enforce it, and to inflict forfeitures and penalties upon any one who should thereafter take or demand an amount of interest exceeding that prescribed by the Constitution. This being the evident meaning of the language of this section, can a contract by which a higher interest is taken or demanded be inferred in a court of justice? It is true the Constitution does not say, in express terms, that such a contract shall be void, nor was such a provision necessary to invalidate it; for it is well settled, by a multitude of decisions in this country and in England, that a contract to do an act forbidden by law is void and cannot be enforced in a court of justice. We do not stop at present to refer to judicial decisions to support this proposition; many cases to that effect are cited in the opinions delivered by the Supreme Court of the United States in *The Bank of the United States v. Owens* (2 Peters, 527); and we are not aware of any decisions, in any court, in which a contrary doctrine has been held. Indeed, in a State where the legislative, executive and judicial departments are separated, it would render all law uncertain and ineffectual if the judicial power enforced, in whole or in part, the performance of a contract to do an act which is altogether forbidden to be done by the Constitution or laws of the State. And as the Constitution has forbidden the taking or demanding of more than six per cent, no contract, made in this State, can be enforced where a higher rate of interest is taken or demanded by the contract.

“This view of the subject is fully supported by the decision of the Supreme Court in the case of *The Bank of the United States v. Owens*, hereinbefore referred to. * * * The absence of any provision inflicting a penalty (say the Supreme Court) does not give the party a right to maintain an action on the contract, if the law forbids the contract to be made; and the reason of the rule laid down is, that the contract being forbidden, the party can

acquire no legal right under it, and consequently cannot maintain an action in a court of justice to enforce it. This incapacity to maintain an action upon it is no forfeiture or penalty, for he acquires no right under it, and therefore there is nothing to forfeit. The money he loans is not forfeited; for if he chooses to rely on the promise of the borrower, and the borrower repays him the money, he may lawfully keep it. It is not forfeited to the State, nor to any one else. But a court of justice cannot lend its aid to recover it, because the contract for the loan is one entire thing, and consequently is altogether invalid or void; and it would be contrary to the duty of a court of justice to assist a party in consummating an act which the law forbids. The absence of any penalty, therefore, is no argument in support of this action.

“But in this case there is something more than the absence of penalties and forfeitures. It is made the duty of the legislature to inflict them; and the prohibitory clause of the Constitution must be construed now in the same manner and have the same effect as if the legislature had performed the duty enjoined upon it. * * * The act of no future legislature can alter the meaning of the words used in the Constitution; they remain the same, and must always be construed and administered in courts of justice according to their legal import as they stand in that instrument, whether future legislatures do or do not obey its mandates and pass laws to enforce its provisions. It follows from what we have said that the first four sections of the act of 1845 are no longer in force. * * * The act of 1845 does not, therefore, prohibit a usurious contract, but sanctions and supports it to the extent above mentioned. The Constitution, on the contrary, by the prohibitory words used in it, makes the whole contract illegal, and thereby incapacitates the party from maintaining a suit upon it for the money he actually loaned or any part of it; and, moreover, treats the taking or demanding more than six per cent as an offense, and commands the legislature to provide forfeitures and penalties against it. The provisions of this act of Assembly, and those contained in the Constitution, are consequently inconsistent with each other, and the former is repealed. In relation to the act of 1704, the plaintiff claims nothing under it; but inasmuch as the first section of that act, like the Constitution, prohibits the taking of more than six per cent, and the second section contains an express provision making void the contract when more is taken, the plaintiff

contends that the omission of the second provision in the Constitution proves that it was not intended to make void the contract, but to leave it as provided for and legalized in the act of 1845.

"But it is evident that the second section of the act of 1704, like similar provisions in the English statutes against usury, was intended to remove any doubt which might be raised upon the words 'exact or take,' and to show that the prohibition was intended to apply to contracts in which usurious interest was reserved, to be paid at a future day, as well as to cases in which it was actually exacted and taken or received at the time of the loan. It was introduced for greater caution, and to prevent nice distinctions upon the words used. This is constantly done in acts of legislation; and the omission in the Constitution of a provision of this description, contained in a previous act of Assembly, would hardly justify the court in inferring that it was intended to authorize an action on a contract which the Constitution itself prohibited.

"In expounding an instrument so solemn and deliberate as a Constitution containing the fundamental law of the State, we are hardly at liberty to suppose that either those who framed it or those who adopted it intended to recognize or sanction the principle that an action might be maintained upon a contract to do an act which the law forbade. * * * The Constitution does not use the prohibitory words of the first section, but provides that no higher rate shall be 'taken or demanded.' Now, these words clearly embrace a contract by which usurious interest is to be paid at a future day, as well as contracts in which it is taken and received. It does not mean usurious interest demanded in the negotiation previous to the loan, but demanded by the contract itself when actually made. And if so demanded, it is evidently included in the constitutional prohibition, even although the words 'exact and taken' should be regarded as confined to the actual receipt" (*Dill v. Ellicott*, *Taney's Cir. Ct. Dec.*, 233, 236, 239, 241.)

The doctrine of this case is, that a contract to do an act forbidden by law is void, and cannot be enforced in a court of justice; that there can be no civil right where there is no legal remedy, and there can be no legal remedy for that which is itself illegal. And this doctrine was applied to the case of a usurious contract in those States where the law is similar to that which was in force in Maryland at the time the case at bar was decided. But the

decision and opinion of the distinguished chief justice is valuable, principally, for the rules laid down by which the statute should be construed.

And it may be added that a close construction will be given to statutes which work forfeitures or confiscations of property. And all statutes in derogation of the common law and contrary to the general policy of the public are to be strictly construed; at the same time full effect will be allowed to the legislative will, and where the words of a statute are plainly expressive of an intent, the interpretation must be in accordance therewith (*Vide Bradbury v. Wagenhorst*, 54 *Penn. R.*, 180; *Esterley's Appeal*, *Ib.*, 192; *United States v. Athens Armory*, 35 *Ga. R.*, 344).

So, also, it may be affirmed that it is well settled that every statute must be held to be prospective and not retroactive in its operation, unless a different effect is clearly to be gathered from its terms, even though general language is used which might include past transactions (*State v. Auditor*, 41 *Mo. R.*, 25; *Finney v. Ackerman*, 21 *Wis. R.*, 268). In respect to usury laws, however, the legislature of the States, in passing their general acts upon the subject, have inserted a clause which puts it beyond doubt that the statutes are not retrospective, and it is safe always to act upon the principle, in the construction of statutes, that the act must receive a sensible construction, even though such construction qualifies the universality of the language (*Vide People v. Adriene*, 39 *Ill. R.*, 251).

It has been held that although a statute, simply modifying the rate of interest or the penalties for usury, cannot apply to a loan made before the act took effect, it may apply to a subsequent agreement by which the parties extend the time for payment of the loan, the terms remaining unchanged (*Story v. Kimbrough*, 3 *Ga. R.*, 21). And the Supreme Court of Illinois has held that a law simply reducing the penalty for usury, as prescribed by the law as it existed at the time the contract was made, and permitting it to be enforced to the extent that it was lawful at that time, does not violate the obligation of a contract (*Parmelee v. Lawrence*, 48 *Ill. R.*, 331; *Drake v. Latham*, 50 *ib.*, 270).

CHAPTER XXIX.

EFFECT OF USURY UPON THE CONTRACT OR SECURITY TAINTED BY IT —
WHEN THE USURIOUS SECURITY IS VOID AS BETWEEN THE PARTIES
— WHEN AS TO SUBSEQUENT HOLDERS OR ASSIGNEES.

THE effect of usury upon a contract or other security, as between the parties to the usury, is oftentimes quite different from what it is as to strangers to the original transaction. In some instances, as in New York, the statute itself declares, in substance, that every conceivable security or obligation, except bottomry and respondentia bonds and contracts, founded in usury, is *ipso facto* void. When such is the law, it matters not whether the usurious instrument is attempted to be enforced by the usurer himself or by a subsequent owner or holder of the usurious instrument. In either case the contract is void and cannot be enforced. And in all cases where the usurious transaction is absolutely void, it can never be rendered valid by the subsequent act of the parties; and it matters not whether or no the contract be carried into execution so as to render the receiver amenable to the penalty of the statute, the usurious contract or security is extinct at its inception.

But when the statute declares the transaction, under certain circumstances, simply usurious, it may be void as to the usurer himself, but valid in the hands of a *bona fide* holder or assignee. Sometimes the statute declares a usurious contract void as between the original parties, but makes an exception in favor of *bona fide* holders without notice of the usury at the time of the transfer. And in other cases the statute declares what shall be the effect of the usury upon the contract or security, by making it valid for the true amount of the money loaned, or the debt secured, and void as to the usury. But it may be laid down as a general proposition, that where the statute does not expressly declare what shall be the effect of the usury, the usurious contract or security will be held to be void in the hands of the usurer himself, and cannot be enforced. So that, as to the original parties, when the transaction is found to be usurious, the question is settled. The contract or security is absolutely void, and can be available for no purpose whatever. If the instrument is given to secure a usurious loan, the lender loses the money loaned; and if the usurious instrument be given to secure a valid debt, the instrument itself is void and

of no account, although the debt purported to be secured by it may still exist. The authorities to this effect are numerous and to the point, and it has been held that this is not the effect of the statute alone, but even at common law usury avoided the contract (*Oliver v. Oliver*, 2 *Rob. R.*, 469; and *vide Sanderson v. Warner, Ib.*, 239; *S. C., Palm. R.*, 291).

It has been suggested in some quarters that there is an exception to this rule; that is to say, that in a case where a mortgage is given on lands in a foreign State, according to the law of that State, it is said that such mortgage will be sustained *in rem*, notwithstanding the contract of loan may be invalid in every place where it is sought to be enforced (*Blyd. on Usury*, 87).

This suggestion seems to have been made upon the authority of a case decided by the late Court of Chancery of the State of New York. It is difficult, however, to extract that precise doctrine from this case. The fact that the loan was secured by a real estate mortgage executed in the State where the lands lay, and where the borrower resided, doubtless made it a proper case in which to apply the principles governing in cases of conflict of laws, while if the loan was made upon personal security alone it would not have been such a case. But the case hardly holds that the *mortgage* could be enforced, when the bond, the foundation of the debt, was absolutely void and of no effect. A brief reference to the authority will show what was therein decided. The facts were these: The defendant Robertson, a resident of the State of New York, being in England in the summer of 1833, where the complainant resided, applied to the latter at his residence for the loan of £800 sterling upon the security of his (Robertson's) bond and mortgage on his lands in the State of his residence, and the complainant then offered to loan him that sum upon the security offered, at an interest of seven per cent per annum, the interest to be paid annually. It was further agreed between the parties that upon the return of Robertson to this State, he should execute his bond and mortgage to the complainant and have the same duly recorded, and should transmit the same to the complainant in England, who, upon the receipt of such securities, was to deposit the £800 with Robertson's bankers in London for his use. The securities were executed and sent to the complainant accordingly. He deposited the money with Robertson's bankers for his use, according to the agreement. Default having been made, the complainant filed his

bill to foreclose the mortgage, and the defendant set up the usury laws of England in his answer as a defense to the suit.

The court held that the mortgage was not usurious, but on the contrary was a valid security for the loan according to the laws of New York, and that the usury law of England could not be set up as a defense to defeat it. Walworth, Chancellor, in his opinion, said: "It is an established principle that the construction and validity of contracts which are purely personal depend upon the laws of the place where the contract was made, unless it was made in reference to the laws of some other place or country where such contract, in the contemplation of the parties thereto, was to be carried into effect or performed (2 *Kent's Com.*, 457; *Story's Conf. of Laws*, 227, § 272). On the other hand, it appears to be equally well settled by the laws of every State or country that the transfer of lands or other heritable property, or the creation of any interest in or lien or incumbrance thereon, must be made according to the *lex situs*, or the local law of the place where the property is situated. And it has been decided that the *lex loci rei sitæ* must also be resorted to for the purpose of determining what is or is not to be considered as real or heritable property, so as to have the locality within the intent and meaning of this latter principle (*Newlands v. Chalmers' Trustees*, 11 *Shaw & Dowl. Sess. Cas.*, 65). The case under consideration would have come clearly within the first of these principles, if the land of Robertson had been the only security for this loan, although he resided in this State, and intended to use the money here, where the legal rate of interest is seven per cent, as specified in the bond. There is nothing in the bond from which it can be inferred that the parties contemplated the payment of the money in this State. And as no place of payment is mentioned, the legal construction of the contract is that the money is to be paid where the obligor resides or wherever he may be found. His residence being in England at the execution of the bond, that must therefore be considered the place of payment, for the purpose of determining where that part of the contract is to be performed. I lay out of view the fact that the bond itself was signed and sealed in this country, because as a mere personal contract it would be wholly inoperative until it was received by the complainant in England, when the money was there to be deposited with the banker for the use of the borrower.

* * * I have very little doubt that a security like that which

is now under consideration, actually executed in the country where the mortgaged premises are situate, by a person domiciled at that place, for the repayment of a loan to be made upon the faith of such foreign securities, and for the purpose of being used by the borrower in the country of his residence, would have been considered as valid by the courts of England, even if this statute had not been passed. And if this was a valid mortgage by the laws of England, so that a recovery might have been had in that country upon the covenant for the repayment of the money, or upon the bond given therewith as collateral security, it is unquestionably a valid security here to give a lien upon the mortgaged premises for the payment of a rate of interest authorized by the *lex situs*.

* * * If no rate of interest was specified in the contract, it might perhaps be necessary to inquire where the money was legally payable when it became due, for the purpose of ascertaining what interest the mortgagee was entitled to receive (*Quiner v. Callender*, 1 *Deacon's R.*, 160; *Scofield & Taylor v. Day*, 20 *Johns. R.*, 102). But if a contract for the loan of money is made here, and upon a mortgage of lands in this State, which would be valid if the money was payable to the creditor here, it cannot be a violation of the English usury laws, although the money is made payable to the creditor in that country, and at a rate of interest which is greater than is allowed by the laws of England. This question was very fully examined by Judge Martin, in the case of *Depeau v. Humphreys*, in the Supreme Court of Louisiana (20 *Martin's R.*, 1); and that court came to the conclusion, in which decision I fully concur, that in a note given at New Orleans, upon a loan of money made there, the creditor might stipulate for the highest legal rate of conventional interest allowed by the laws of Louisiana, although the rate of interest thus agreed to be paid was higher than that which could be taken upon a loan by the laws of the State where such note was made payable. Here the verbal contract for a loan upon the security of a mortgage upon lands in this State was wholly inoperative until the mortgage and other written security were executed in this State, and which agreement was consummated by the deposit of the money to the order of the borrower. It was a contract partly made in this State and partly in England, and being actually made in reference to our laws, and to the rate of interest allowed here, it must be governed by them in the construction and effect of the contract as to its validity. * * *

The usual decree for a foreclosure and sale must, therefore, be entered." (*Chapman v. Robertson*, 6 *Paige's R.*, 627, 630-635).

The soundness of this case has been questioned by high authority, although it does not seem ever to have been expressly overruled, and the decision itself does not sanction the idea that when a loan is made between parties of the same State, and in the State where they reside, and the loan is contracted to be repaid in the State where the loan is made, with interest at a rate above what is allowed by the laws of the State where the contract was made and is to be performed, and the payment of the loan is secured by a mortgage on lands in a foreign State, where the interest reserved would be legal, the transaction is not usurious, so far as the mortgage is concerned, and that the mortgage can be enforced. But, rather, the chancellor holds that the *contract* in that case was made with reference to the laws of New York, and as the *transaction* was not usurious by those laws, the mortgage was a valid security, and could be enforced. The *decision* of the chancellor was doubtless correct, whatever may be said of the reasons which he assigned for it. The fact that a usurious loan is secured by mortgage on real estate in a country where the loan would not be usurious will not probably change the nature of the transaction. It is true that when a mortgage is given, the laws of the State where the land is situated must control as to the form of the mortgage, its manner of execution and acknowledgment; but those laws may not necessarily control with respect to the question of usury in the case. The rule adopted in cases of real estate, called *lex rei sitæ*, does not govern the question of usury involved in a contract secured by real estate collaterals. The fact that a mortgage is given upon real estate as a collateral security for the payment of the contract of loan, does not restore the contract to validity, for collaterals cannot affect the original inception of a contract of loan, because they are mere dependent incidents, and subsequent in their nature. For this reason, it would seem quite reasonable that if the original contract of loan was void for usury, the security collateral to it, whatever its nature, would also be usurious and void, and could not be enforced. So, after all, it may be affirmed that *every* contract, assurance or security, which is founded in usury, as between the original parties to the transaction, at least, is *ipso facto* void, and can never be rendered valid by the subsequent act of the par-

ties; whether the same is void as to other parties will depend upon circumstances which it becomes necessary to refer to.

As has been before suggested, where the statute declares that the usurious instrument shall be *void*, it will be so regarded, into whosoever hands it may go, or whoever may attempt to enforce it. But in some instances the statute excepts certain parties from its effects, who may not be connected with the original usurious transaction. In such cases, however, the statute usually exempts only such parties as may be entire strangers to the usury, and who may have become possessed of the usurious security *bona fide*, and without any notice of the original usury, and upon a good and valid consideration. So that in those cases, after the original usury is established, the question to be litigated is, whether the party is a *bona fide* holder of the tainted security, and whether he paid legal value therefor. The rules by which these questions are determined will be best understood by a reference to a few of the leading authorities upon the subject.

Under the old English statutes of usury, it was well settled that a stranger must "heed to his assurance at his peril," and he could not set up his ignorance of the corrupt contract in support of his claim to recover upon a security which originated in usury. So that but little light would be obtained upon the subject by a reference to the authorities under those statutes.

Previous to the Revised Statutes of 1830, in the State of New York, the old Supreme Court of the State held that where a usurious note had been transferred for a valuable consideration and without notice of the usury, and a new note had been taken by the holder, the usury of the first note could not be set up in bar of a recovery on the second note.

Savage, C. J., gave the opinion of the court, and said: "The other point is equally well settled. Even although it had been shown that the first note was tainted with usury, and therefore void in the hands of the Franklin Bank, who had paid value for it without notice of the usury, yet the giving a new security to an innocent holder for valuable consideration constitutes a new transaction, and the usury of the first note does not affect the second. In *Powell v. Waters* (8 Cowen, 681), Chancellor Jones, speaking of the proposition that a new security, taken in renewal of a prior usurious contract by a *bona fide* holder, is not avoided by the usury of the original transaction, says, 'that principle

applies to the case of an innocent holder of a usurious contract, for which he has given a valuable consideration without notice of the usury.' Colden, senator, expresses the same sentiment at page 696; among the principles which he considers well settled, he says: 'If an original note or security be usurious, a subsequent note or security, taken in the place of the original note or security by an innocent and *bona fide* holder thereof, ignorant of the original usury, is not usurious, unless more than at the rate of seven per cent was taken upon the new note or security.' This was the doctrine asserted by the learned judge at the circuit, and is sound law" (*Kent v. Walton*, 7 *Wend. R.*, 256, 258).

This decision was made when the Revised Laws of New York were in force, by which usurious securities were declared void. The provisions of the Revised Statutes of the State, which protected *bona fide* indorsees of negotiable paper, did not take effect until 1830; and this case was tried in 1829.

The provision of the Revised Statutes of New York upon the subject of usury as originally passed, declared usurious notes, etc., void, but that this should not extend to an indorsee in *good faith*, for valuable consideration, and without actual notice that the note had been originally given for a usurious consideration. Under this statute it was held, by the old Supreme Court of the State, that a party who bought an accommodation note before it had been used for any business purpose, stood in the same situation, in respect to the defense of usury, as if he were the payee named in the note; and this, though he took the note supposing it to be business paper, and therefore that such a party was not entitled to be protected as an indorsee or holder in good faith, within the meaning of that provision (*Aeby v. Rapelye*, 1 *Hill's R.*, 9). And it seems that the courts of the State of Maryland have held the same doctrine, under similar provisions of law (*Cockey v. Forrest*, 3 *Gill. & John. R.*, 483).

This would seem, at the first glance, to be contrary to the intent and spirit of the statute. But the argument was that the note had its inception by the act of discount, and the case was, therefore, as if it had been made payable directly to the indorsee on his advance of a usurious loan; and it was said that the statute did not protect a man who participated in the concoction of usurious paper—a man who was himself the prominent actor in the usurious transaction.

In the State of Maine, under a similar statutory provision, the Supreme Court held that wherever a note is purchased after the day of payment shall have elapsed, the maker is entitled to the defense of usury in a suit by an indorsee, as fully as if the note had remained in the hands of the payee (*Wing v. Drunn*, 11 *Shep. R.*, 128). It was held in the same State, however, that in an action by an indorsee against the maker of a note, usury between the indorsee and indorser cannot be set up in defense (*Clapp v. Hansen*, 3 *Shep. R.*, 345).

It has been held, both in Massachusetts and Missouri, that it is a good defense to an action, by an indorsee against the indorser of a note, indorsed for the accommodation of the maker, that the indorsee received the note as security for the performance of a usurious contract between him and the maker (*Dunscomb v. Bunker*, 2 *Met. R.*, 8; *Winser v. Shelton*, 7 *Mo. R.*, 237).

And in the State of Mississippi it has been held that a note or other security given in renewal of a usurious note was usurious; and that an indorser of a note, who takes it with notice that it is tainted with usury, takes it subject to that defect, and that, although the maker, before the indorser took it, promised him that he would not take advantage of it; that the consideration being illegal, the waiver was not binding on the maker. But that it would be otherwise where there was a mere failure of consideration (*Torry v. Grant*, 10 *Smede & Marsh R.*, 89).

Under the stringent usury laws of New York it was held by the late Court of Chancery of the State that the innocent indorsee of a usurious promissory note, after maturity, would be protected, and a new security given therefor by the maker would be valid.

The facts of the case were these: W., as indorsee, held a note made by S. and attached his goods, but discharged the attachments on S.'s giving him a new note, and S. set up usury between himself and the payee of the former note, and insisted that the new note was thereby tainted. The court held that the new note was valid, if, as was the presumption, W. was a *bona fide* holder of the old one for value, and without notice of the usury (*Smedberg v. Whittlesey*, 3 *Sand. Ch. R.*, 320). And it was distinctly declared, in a case before the Superior Court of the city of New York, that where a party to a usurious note gives a new security for it to one to whom it has been transferred for a valuable consideration without notice of the usury, the security is valid, although the holder could not

have recovered on the note, and although he had notice of the usury after the maturity of the note, and before receiving the security (*Smedbury v. Simpson*, 2 Sand. R., 85).

It was held in this last case that the indorsee of a negotiable note will be presumed to have received it before maturity, and without notice that it was tainted with usury before he received it. This doctrine is important in its application to the point under consideration.

In the State of North Carolina, the Court of Chancery has held that a note made with intent of being usurious, by being discounted, for the accommodation of the maker or the payee, or both of them, will not be obligatory between the parties, and is void in the hands of one who discounts it at a usurious rate; and it was said that there was no difference between a man's making his own note to the lender and getting a friend to make a note to himself, and his passing that to the lender; and it seems not to be material in such case, under the statute of North Carolina, whether the lender knew the intention of the parties to the note or not (*Simpson v. Fullenwider*, 12 Ired. Eq. R., 334).

But the Supreme Court of the same State has held that the assignee of a bond, valid between the obligor and obligee, may recover of the obligor the full amount of the bond, although he purchased it at a discount and claims through a usurious indorsement.

Ruffin, J., in giving the opinion of the court, said: "The bond was available between the obligor and obligees. The former is not privy to the usurious agreement between the latter and the present holder. If the security be in its origin usurious, it is void, into whose hands soever it gets, by the words of the statute. If it be good in its origin, a subsequent usurious agreement between the same parties does not avoid it, though it may subject the one party to the penalty, if anything be received under the corrupt agreement. And if it be good in its origin, the subsequent transfer of it, usuriously, does not affect it as against the maker. No redress can be had on the indorsement as between the parties to it. The very object of the statute is to protect the borrower as an oppressed man. But there is no oppression on the obligor, who is a true debtor. The law was not intended for his protection" (*Collier v. Nevill*, 3 Dev. R., 30).

Under the statute in force in Georgia in 1852, it was held that

when a judgment not tainted with usury was transferred and the transferee agreed with the defendants to forbear its collection for a term of time, in consideration of usurious interest paid him, such subsequent agreement was usurious, and affected the judgment so far as to make the principal due thereon only collectible (*Troutman v. Barnett*, 9 Geo. R., 30). This is different from the rule at common law, for, according to that, a contract which is not tainted with usury in its inception is not made usurious by a subsequent agreement to pay usury in consideration of forbearance. The subsequent agreement would be void for usury, but the original contract would remain intact.

The Court of Chancery of the State of Maryland decided, in 1853, that the statute against usury could not be evaded by any shift or device, and that no matter what the form of the transaction might be, the courts would explore the real truth, and if they discovered that the object was a loan of money at more than the legal interest it would be condemned, and it was held that a renewal of the usurious contract between the same parties partakes of the infirmity of the original agreement; but that if the latter is discharged, or is made the consideration of a contract entirely new, as being with a third party, not a party to the original contract, or to the usury paid, or as combining other parties and considerations than those in the original contract, and with no proof that it was a contrivance to evade the statute, the rule would be different. The chancellor in the case refused to set aside an agreement made more than eight years after the alleged usurious contract, carried into execution on both sides, and combining other parties and considerations than those in the original contract, and with no proof that it was a contrivance to evade the statute (*Brown v. Waters*, 2 Md. Ch. Decis., 201).

In the State of Virginia the following case was declared not to be affected by the usury of the contract, as against an assignee of the contract: A. took the oath of insolvency at the suit of B., and surrendered a bond on C., upon which the sheriff, for the benefit of B., brought suit against C., who plead, in off-set, a judgment he had recovered against A. upon a bond that had been assigned to him. He sued A. upon this bond before he took the oath of insolvency, but the judgment was not recovered until after the oath, but before the suit against him by the sheriff. The sheriff replied that the bond upon which the judgment was recovered was

usurious. The court held that usury in the bond, upon which the judgment was recovered, could not be set up to the judgment, and that it was a good set-off (*Hope v. Smith*, 10 *Gratt. R.*, 221).

It has been held by the Supreme Court of Maine that an indorsee of a note, given entirely for usurious interest, whose agent was cognizant of all the circumstances, is not an innocent indorsee who will be protected. And it was declared that a note given entirely for extra interest above the legal rate on a sum loaned, has no legal consideration (*Goodrich v. Buzzell*, 40 *Maine R.*, 500).

It has been held by the Supreme Court of Connecticut that by the law of the State of New York, where a debtor gives a new security for his usurious debt to the *bona fide* assignee of such debt, who took the original debt and takes the substituted security, without any knowledge of the usury, such debtor cannot afterward set up the usury as a defense to a suit brought by such assignee upon the substituted paper (*Houghton v. Payn*, 26 *Conn. R.*, 396). This is in accordance with the decisions in the State of New York, to which reference has been hereinbefore made.

But in the State of Kentucky the indorsee of promissory notes was held to be affected by usury in the original transaction. The facts were these: A member of a firm assigned to his son, as an advancement, a note made to the firm, which note was subsequently taken up by the obligor, he giving two other notes, payable to two other persons, who indorsed them to the son. The two notes not being paid when due, the son brought an action against the maker to recover the amount of them, and the obligor alleged and proved, as a defense, that the members of the firm were the beneficial owners of the notes, and that he had paid them usury on the transaction. The court held that he was entitled to a credit on account of the usury paid (*Humphreys v. Pearce*, 1 *Duwall's R.*, 237).

In the State of Indiana, usury was made available as against an indorsee under the following circumstances: A borrower, in consideration of a loan, executed a negotiable promissory note, with interest for a sum greater than the amount of the loan, promising to give a mortgage to any holder of the note, and the payee indorsed the note to a third party upon the execution of a mortgage by the maker to the latter. The court held that the maker could set up the defense of usury in an action on the note (*Musselman v. McElhenny*, 23 *Ind. R.*, 4).

And in the State of Iowa it has been held that the defense of usury may be set up to an action on a note by an indorsee, notwithstanding a promise to pay it, made by the maker to such indorsee after indorsement (*Allison v. Barrett*, 16 Iowa, R., 278).

In the State of Vermont, in an action to recover back money paid as usury, it appeared that the defendant agreed to obtain a loan of money for the plaintiff, and did obtain it of H. at a usurious rate of interest, and that he received seventy-five dollars from the lender as a part payment of the transaction. Subsequently he purchased the plaintiff's note of H., and the plaintiff paid him the principal and the usurious interest. H. admitted that he received one-half of the extra interest included in the note, and settled with the plaintiff therefor. The court held that the defendant was a party to the usurious contract, so as to be liable to repay the usury he had received. The theory of the decision of the court was, that the plaintiff's cause accrued when the payment was made by him, and not when the defendant received the seventy-five dollars from H. (*Williams v. Wilson*, 37 Vt. R., 613).

In the State of Iowa, usury in the original transaction was held not to be available under the following circumstances : V. loaned the maker of a note, which was usurious, money to take it up, and received the note and the security for its loan. The Supreme Court held that the usury could not be set up as a defense to the note in V.'s hands, whether V. had notice of the usury or not (*Wendlebone v. Parks*, 18 Iowa R., 546).

The Supreme Court of the State of Illinois has held that when a note tainted with usury is assigned by the payee to a creditor as collateral security for a pre-existing debt, he is a holder for a valuable consideration, but only to the extent of the debt due him; and it was decided that the same defense might be made to the residue of the note as if it had not been assigned (*Taylor v. Daniels*, 37 Ill. R., 331).

The Court of Appeals of the State of New York have lately given a construction to the laws of Ohio on the subject of usury, and decided that, in respect to purchasers of commercial paper in good faith and for value, it is no defense, under the laws of that State, that the contract was usurious as between the original parties (*Farmers' and Mechanics' Bank v. Parker*, 37 N. Y. R., 148). The precise doctrine had been previously settled by the Supreme Court of Ohio, and the reasoning and conclusions of the court

would seem to be conclusive upon that subject (*Pickaway County Bank v. Prather*, 12 *Ohio St. R.*, 497, 511).

CHAPTER XXX.

EFFECT OF USURY UPON PRIOR AND SUBSEQUENT SECURITIES, COLLATERAL TO THE CONTRACT INFECTED WITH THE ORIGINAL TAINT—REFORMING THE ORIGINAL CONTRACT—JUDGMENT UPON THE USURIOUS TRANSACTION, AND THE LIKE.

THE effect of usury upon instruments entering into the usurious transaction, or upon instruments which are predicated in whole or in part upon the contract infected with usury, depends upon principles which are well defined by the courts, and may be understood by a reference to some of the leading authorities upon the subject.

The statute of New York declares void all contracts and securities affected with usury, without any reference to the source from which the objection comes or the consequences which may follow. But the courts have been disposed to fix some limit to the influence of this sweeping provision, even, and it seems necessary that they should do so, for otherwise the greatest injustice would often be done to innocent third parties. It has accordingly been held that a *bona fide* purchaser, under a statute foreclosure of a mortgage void for usury, will acquire a good title. This was so held by the old Supreme Court of the State of New York, in a case in which the precise question was involved. Kent, C. J., in delivering the opinion of the court, said: "The principles of public policy, and the security of titles, are deeply concerned in the protection of such a foreclosure. If the purchase was to be defeated by the usury in the original contract, it would be difficult to set bounds to the mischief of the precedent, or to say in what sequel of transactions, or through what course of successive eliminations, and for what time short of that in the statute of limitations, the antecedent defect was to be deemed cured or overlooked, so as to give quiet to the title of the *bona fide* purchaser. The inconvenience to title would be alarming and enormous. The law has always had regard to derivative titles, when fairly procured; and though it may be true, as an abstract principle, that a derivative title cannot be better than that from which it was derived, yet

there are many necessary exceptions to the operation of this principle" (*Jackson v. Henry*, 10 *Johns. R.*, 185, 197; and *vide Elliott v. Wood*, 53 *Barb. R.*, 285). The same doctrine was early advanced by the English courts, in cases which arose under a usury statute similar to that of New York.

In one case, it appeared that A. made a usurious note to B., who transferred it to C. for a valuable consideration, without notice of the usury, and A. thereupon gave a bond to C. for the amount. The court held that the bond was not affected by the usury in the original transaction. And Lord Kenyon observed, in the case, that if the defense "were to succeed, it might affect most of the securities in the kingdom; for if, in tracing a mortgage for a century past, it could be discovered that usury had been committed in any part of the transaction, though between other parties, the consequence would be that the whole would be void. It would be a most damning proposition to the holders of all securities" (*Cuthbert v. Haley*, 8 *Term R.*, 390).

And in a still earlier case, wherein it appeared that the defendant was indebted to one Alder in £100 on a usurious contract, and Alder was indebted to the plaintiff in £100 of just debt, and the defendant, for the payment of the usurious debt to Alder, joined with Alder in a bond for £100 to the plaintiff, and the bond was held good, because the debt to the plaintiff was a just debt, and he was ignorant of the usury; and the court said, "for as on the one side it may be said to be the means to defraud the statute, so on the other side it may be a greater mischief to a true creditor, where he shall take security by way of bond with sureties for money, if it should be examined whether there were any corrupt agreement betwixt the creditor and his surety, whereof he cannot by intendment have any conversance" (*Ellis v. Wares*, *Cro. Jac.*, 33).

The doctrine of these cases seems to be, that as long as the usurious contract remains executory, so long the borrower may avail himself of the usury; but not after the contract is executed. If the lender comes into a court to enforce the contract, the borrower may object that the contract is usurious; or if the borrower seeks relief in a court, he can obtain it only on terms. But where the contract is executed, and rights vested under it in due form of law, the borrower can never raise the objection of usury. And yet this doctrine is not of universal application.

The old Supreme Court of the State of New York decided that where upon the foreclosure of a usurious mortgage the mortgaged premises were purchased by the mortgagee himself, his title might be impeached. The case was where a mortgage was given as security on a usurious contract, with a power of sale, and the mortgagee, by virtue of the power of sale, sold the land, under the act of the State concerning mortgages, and became the purchaser through an agent for that purpose. An action of ejectment was then brought against such mortgagee, by a purchaser of the equity of redemption, and the defendant set up a title acquired by the sale under his mortgage. The court held that the plaintiff might prove usury in the mortgage, and recover, notwithstanding the mortgage. And the court further held that a foreclosure of a mortgage, by virtue of a power of sale under the statute, was not founded on any judgment or decree of any court, but that it was the mere act of the mortgagee; and he, being party to the usurious contract, was in no better situation than if no foreclosure had taken place (*Jackson v. Dominick*, 14 *Johns. R.*, 435). And the probability is that the same doctrine would be held in respect to any other purchaser who had notice of the usury at the time of the sale. The courts seem inclined, so far as they can, to protect an innocent party who has no notice of the usury. But in all cases where a new security is substituted for a usurious one, by the same parties, the original taint of usury will affect the new security.

Under the stringent provisions of the New York statute it has been held that contracts affected by usury are not so utterly void but that they may be ratified; and upon this principle it has been declared that if a borrower repay a loan, which he might have avoided for usury, he cannot recover the money back again; though, under the statute, he may recover the excess which has been paid beyond legal interest. So, it has been decided that if a debtor make a conveyance of his land to the creditor, in satisfaction of a usurious debt, the deed cannot be avoided for the usury. The original taint of the consideration does not, in such a case, affect the conveyance (*Denn v. Dodds*, 1 *Johns. Cas.*, 158; and *vide Pratt v. Adams*, 7 *Paige's R.*, 615). And under the old English statute of usury it was held that where a man has conveyed his property upon a usurious contract, the deed will stand good until the grantor or some one claiming under him chooses to avoid it;

that is to say, the conveyance is declared not to be a mere nullity (*Whelpdale's Case*, 5 *Coke's R.*, 119; *S. C.*, *Buller's N. P.*, 224). The doctrine, however, is well settled, that where the original loan is usurious, all the securities therefor, however remote or often renewed, are void, as between the original parties; and, according to the New York statute against usury, as against third parties as well. A mere change of securities for the same usurious loan, to the same person who committed the usury, or to a party who had notice of it, can never purge the original consideration, or give a right of action (*Tuthill v. Davis*, 20 *Johns. R.*, 285; *Price v. Lyons Bank*, 33 *N. Y. R.*, 55; and *vide Dunning v. Merrill, Clarke's Ch. R.*, 253; *Wales v. Webb*, 5 *Conn. R.*, 154; *Hammond v. Bangs*, 1 *Kelley's R.*, 416; *Torry v. Grant*, 10 *Smede & Marsh. R.*, 89; *Jackson v. Jones*, 13 *Ala. R.*, 125). If the usurious contract be mutually abandoned by the parties, and the securities are canceled or destroyed so that they can never be made the foundation of an action, and the borrower subsequently make a contract to pay the amount actually received by him, this last contract will not be tainted with the original usury, and can be enforced. But there is no possible mode in which a usurious security can be made good. The vice, as to such security, is incurable. Still, the parties to a usurious transaction may doubtless reform it; and by canceling the usurious security and giving a new obligation for the real sum which ought to be paid, excluding all usury, the party will be bound (*Vide Hammond v. Hopping*, 13 *Wend. R.*, 505; *Kilbourn v. Bradley*, 3 *Day's R.*, 356; *McClure v. Williams*, 27 *Vt. R.*, 210). But it has been held that a security founded upon the abandonment of a usurious agreement is invalid, unless the usurious contract was abandoned with a full knowledge in both parties of the precise situation of such contract; and such knowledge must be brought home to the borrower by positive proof (*Bank of Monroe v. Strong, Clarke's Ch. R.*, 76). And where money was lent in the city of New York, and notes taken therefor payable in New York at a usurious rate of interest, both parties being residents of that city, and when the notes were maturing the lender of the money and the holder of the notes were temporarily in Connecticut, whose laws did not recognize the usury, and there renewed the loan by taking new notes of the borrower and others residing in New York, without any deduction of the usury; the courts held that the usurious contract was not reformed, but that

the renewal was to be judged by the laws of New York, and that the new notes were void (*Jacks v. Nichols*, 5 N. Y. R., 178, affirming 3 Sandf. Ch. R., 313, and reversing 5 Barb. R., 38). But the moral obligation which the borrower of money at usurious interest is under to pay the principal sum due and legal interest, is a sufficient consideration to support a promise by him to pay such principal and interest; and, hence, a new security, given for the true amount, in place of the usurious one, can be reformed; but the subsequent security in place of the old one must not include any of the taint of the excessive interest, or it will be infected with the original taint.

Where money was loaned on a usurious contract, and, on maturity of the note given for the loan, it was partially paid, and a new note, similar to the former, given for the balance, it was held that the new note was void for usury; and, in the same case, it appeared that the borrower was not a party to the usurious note, being neither maker nor indorser, but the security was such, both as to parties and time of payment, as had been previously agreed between the borrower and lender; and the court held that the indorser, in an action against him, might show the usury in bar of the action (*Warren v. Crabtree*, 1 Greenleaf's R., 167; and vide *Chadbourne v. Watts*, 10 Mass. R., 121). And where A., being the maker of a note to B., which was void for usury, asked for credit beyond the maturity of the note, and B. agreed to give further credit if he could obtain other security, and A. obtained and furnished, for that purpose, a new note, made by C., payable to and indorsed by D., which was received by B. in exchange for the former note, which was given up and canceled, it was held by the Supreme Judicial Court of Massachusetts that this latter note was void in the hands of a *bona fide* indorsee without notice, the same being a mere substitute for the first note (*Bridge v. Hubbard*, 15 Mass. R., 96).

So, also, where a surety upon a usurious note, who was a party to the same, applied to the holder for the note, that he might secure it out of the estate of the maker, who was in failing circumstances, and gave his own note to the holder in lieu of it, the Supreme Court of Connecticut held that the note so given was a substitute for the other, and therefore usurious. But the court decided that if a surety upon a usurious note, who is a party to the same, obtains payment of it from the maker, and is thereby fully indemnified, and gives his own note to the holder for the amount, the latter

note is not usurious (*Botsford v. Sanford*, 2 Conn. R., 276; and *vide Scott v. Lewis*, *Ib.*, 132).

A case came before the present Supreme Court of the State of New York involving the question under consideration, under the usury laws of this State, which was as follows: A. executed a mortgage on his land to secure a usurious loan. He subsequently requested the defendant to execute a mortgage upon his land to the lender in place of A.'s mortgage, which was done, but without any consideration, and the mortgage of A. was, thereupon, given up and canceled. The court held that the mortgage executed by the defendant, as well as the first mortgage, was void for usury; and it was declared that any security, given in payment or discharge of a usurious security, is equally void with the original security, and that the original taint of usury attaches to all subsequent considerations, obligations and securities growing out of the original vicious transaction; that a new security of the borrower for the same debt secured by the usurious mortgage would be vitiated by the usury, and that the obligation of a third person stands upon no better foundation.

Allen, J., delivered the opinion of the court and examined a large number of authorities, both English and American, and showed, very clearly, that the law was well settled in accordance with the several positions laid down in the case, and that the final decision of the case was well sustained, both upon principle and authority (*Vickery v. Dickson*, 35 Barb. R., 96, and *vide Stanley v. Whitney*, 47 *ib.*, 586).

The same learned court held in a subsequent case that where the consideration of a mortgage was partly a previous valid loan and partly the assignment of a former usurious security at its full nominal value, and the mortgagors defeated the mortgage on the ground of usury, the mortgagee was entitled to the amount of the previous valid loan, which was not tainted by the subsequent usurious transaction (*McCraney v. Alden*, 46 Barb., 272).

And in the Court of Appeals of the State of New York it was held that where a valid claim is embraced in a subsequent security, which is invalid because made upon a usurious consideration, the valid claim will not be thereby rendered void or in any way discharged, but that the owner thereof will be restored to his rights under the original claim (*Cook v. Barnes*, 36 N. Y. R., 520; *Farmers' and Mechanics' Bank v. Joslyn*, 37 *ib.*, 253).

The Court of Common Pleas of the city of New York have held that where a judgment has been recovered on a note and settled by the defendant's giving new security, the defendant cannot, in a suit brought on such security, show usury in the original transaction. And it was decided in the same case that when a note is received at less than its face as security for a judgment and in part payment, but the judgment is only to be satisfied if the note is paid, such is not usury, but that the plaintiff can only recover the amount due on the note (*Cromwell v. Delaplaine*, 5 N. Y. Leg. Obs., 226).

This last mentioned case, doubtless, was decided upon the principle that after a judgment has been duly recovered upon a contract the same is conclusive upon the parties until it is reversed or set aside. In other words, that by the judgment it is judicially determined that the cause of action upon which the judgment was entered was perfectly legal and just, and hence when the judgment is paid or secured the party is not at liberty to go back of the judgment for matters to impeach such payment or security. If a judgment be originally given or confessed by the borrower, to secure a usurious loan, it may be set aside for the usury; but so long as it is in force such judgment is conclusive between the parties, even under the sweeping provisions of the usury statutes of New York.

A case came before the late Court of Chancery of the State of New York, in which it appeared that the purchase-money of a parcel of land had been paid, except about \$700, which was past due under the contract, which did not, however, make punctual payment an essential part of the agreement; whereupon the vendee applied for delay, and the vendor delivered to him an absolute deed, and took back a bond and mortgage for \$1,000 and interest. The court held that it was a palpable case of usury, and that the usury entered into the bond and mortgage, so that they could not be enforced and must be set aside, notwithstanding it was decided that the original debt was not invalidated and that the unpaid purchase-money remained an equitable lien upon the land (*Crippen v. Heermance*, 9 Paige's R., 211).

The doctrine is well settled that a *bona fide* debt is not lost by having been made a consideration, in part or in whole, of a contract which has been avoided for usury; and it has uniformly been held that if the security for such debt was given up in the making

of such usurious contract, other evidence of the debt is admissible in the action brought upon the usurious contract, and, when the action is in the proper form, a recovery may be had thereon in the same action. This practice was tolerated and sanctioned in some of the cases already cited, and others may be referred to (*Vide Edsel v. Stanford*, 6 *Vt. R.*, 551; *Rice v. Welling*, 5 *Wend. R.*, 595; *Parker v. Cousins*, 2 *Gratt. R.*, 372; *Brannock v. Brannock*, 10 *Ind. R.*, 428; *Cook v. Barnes*, 36 *N. Y. R.*, 520).

As the law stood in the State of Indiana, in 1847, an instrument was void for usury, and it was held that a note void in its inception would be void in the hands of an indorsee without notice of the usury; and, moreover, that a mortgage taken by an indorsee of a usurious note, to secure its payment, was void, although the indorsee had no notice of the usury at the time of the indorsement, especially if at the time of taking the mortgage he had such notice (*Morgan v. Tipton*, 3 *McLean's R.*, 339).

In the State of Alabama, it was held that if a contract is usurious in its inception, no renewal of the note or change in the form of the contract can alter its first character; but that the taint of usury follows it even in the hands of a *bona fide* holder, unless he receives it through the fraud of the maker (*Pearson v. Bailey*, 23 *Ala. R.*, 537).

It was held in the State of Kentucky, in 1860, that where usury in the debt sought to be collected was known to the party before the judgment by ordinary proceedings was rendered against him, and was then available as a defense either at law or in equity, and he failed to rely on it, but sought an injunction or modification of the judgment to the extent of the usury, such party was not entitled to the relief; but it was held in the same case that if he had paid the usury, he might sue for and recover the amount of the party receiving it (*Chinn v. Mitchell*, 2 *Met. R.*, 92). The same principle was involved in this case as in that before referred to, decided by the New York Common Pleas.

The Superior Court of the city of New York has held that the defense of usury cannot be interposed against the *bona fide* holder of a negotiable check, although it be invalid between the maker and payee on that account. And where it appeared that such check had been paid, partly in money and partly by a new check substituted therefor, the court held that the defense of usury was not available in an action on the new check, although it was drawn

payable to the order of the payee of the original check, and was indorsed by him in blank at the request of the holder. A question of practice arose in the case which may have prevented the real question of usury, but the law was declared, notwithstanding, as above (*Smalley v. Doughty*, 6 Bosw. R., 66).

The doctrine is perfectly well settled and familiar that no contract or security, valid in its inception, can be tainted or invalidated by any subsequent usurious transactions.

A decided authority on the same point is found in a case lately decided by the courts of New Jersey. An action was brought to foreclose two mortgages, and the defense of usury was interposed. The usury alleged consisted in the mortgagee's taking more interest than was due upon them at the time he assigned them to the complainant, in pursuance of an arrangement with the defendant, and as a compensation for receiving payment of the debt without notice and contrary to a previous undertaking between the parties. The court held that this did not affect the validity of the mortgages in the hands of the assignee, and the rule was reiterated that where the security is valid in its inception, no subsequent taking, or contract to take, illegal interest will invalidate it; and it was further held in the case that the only effect of the payment of interest on the bond to a period later than the date of the assignment, if the payment is indorsed on the bond or made with the knowledge of the assignee, would be to diminish by the amount overpaid the interest which the assignee would be entitled to recover (*Smith v. Hollister*, 1 McCarter's R., 153).

In the State of Kentucky the following case of alleged usury came before the courts: A note was executed to a guardian, upon which usurious interest was paid. At the majority of the ward, the note was assigned to him, and subsequently taken up by the obligor's executing a new note to him. This last note not being paid, suit was brought upon it, and the defense of usury interposed. The court held that the usurious interest paid to the guardian upon the first note could not be made available as a defense, or by way of counter-claim, to the action upon the new note (*Stone v. McConnell*, 1 Duvall's R., 54).

The courts of Kentucky have also recently held that where a claim for usury by the defendant in a judgment against the plaintiff existed when the judgment was recovered, it cannot afterward be the cause for a simple modification of the judgment. But it

was decided, nevertheless, that when the plaintiff in the judgment subsequently became a non-resident of the State, the court has an equitable jurisdiction to set off the usury against the judgment (*Moss v. Rowland's Executor*, 1 *Duvall's R.*, 321).

The Supreme Court of Wisconsin has held that where a judgment is entered by virtue of a warrant of attorney on a note void for usury, a court of equity will set it aside on condition that the maker pays the amount which the payee would have been entitled to recover (*Lee v. Peckham*, 17 *Wis. R.*, 383).

The Court of Appeals of the State of New York have recently decided that where A. procures an assignment of a mortgage given by B. to C. to secure further advances, and agrees with B. to extend the time of payment thereof, and make a further advance thereon on usurious terms, the effect of such usurious contract does not extend to the amount advanced on the mortgage before the assignment, so as to prevent A.'s obtaining a judgment against B. for that amount (*Kellogg v. Adams*, 39 *N. Y. R.*, 28).

In a case recently before the Supreme Court of Pennsylvania, it appeared that a party borrowed money at a usurious rate of interest, and gave a note with surety; that he paid the usurious interest for several years, when the original note was taken up and another given for the same amount with a new surety. The court held that the new security was usurious, and that no more could be recovered on it than on the original (*Campbell v. Sloan*, 62 *Penn. R.*, 481).

The doctrine of the authorities, then, is, that no contract or other security which is valid in its inception can be invalidated by any subsequent usurious transaction; and, on the other hand, there is no possible way by which a contract or other security which is usurious in its inception can be made good. But the parties to a usurious transaction may reform it, which can only be done by canceling the usurious security and giving a new obligation for the real sum which ought to be paid, excluding all usury; except that as to indorsees and holders of such securities, to whom they were transferred in good faith, for a valuable consideration, and without notice of the original usury, the whole amount of the usurious transaction may be secured by a new security, and the party bound by it; for in all cases where third persons are interested in the new transaction, the courts regard it with favor. That so long as the usurious transaction is executory, the original taint

will continue; but when it is concluded by a judgment, the execution of a deed, the foreclosure of a mortgage, and the like, the original usury is not available against the judgment or instrument by which the transaction is closed up.

CHAPTER XXXI.

USURY AS A DEFENSE TO AN ACTION — WHO MAY INTERPOSE THE DEFENSE OF USURY — NONE BUT THE BORROWER OR THOSE IN PRIVACY WITH HIM CAN SET UP THE DEFENSE — PARTIES MAY ALSO BE ESTOPPED OF THEIR RIGHT TO INTERPOSE THE DEFENSE.

As a general proposition it may be affirmed that no usurious transaction will be upheld by the court, and that in no instance can the holder of a usurious security succeed in a direct attempt to enforce it. But this is not the *universal* rule, and cannot be said to be correct under all circumstances and between all *parties*. The doctrine is well settled that the defense of usury can only be taken by the *party* to the usurious agreement, or persons representing him as privies in blood or estate. A *stranger* cannot set up usury as a defense to an action. The maker of a usurious note, bond or mortgage may pay it, and when it is paid he cannot recover back the money, except where the statute provides, as in some cases, that the excessive interest may be recovered back. So he may agree with another for a valid consideration to pay it, and in that case the person agreeing to pay it cannot resist the payment on the ground of usury. He may also set apart and dedicate a certain fund or certain specified property to the payment of the usurious security, and his agent, who has received the funds with which to pay it, cannot withhold it on the ground of usury. It is in all these cases the party who owes the debt, and who devotes his property to pay it, that can alone set up the defense of usury. If for any reason—his desire to avoid litigation, his pride of character, or his conscientious sense of justice—he may be induced to waive his legal rights and to satisfy a demand, he is at liberty to do so, although it may be obnoxious to the defense of usury. And whenever he sees fit not to set up the defense of usury against such a demand, and makes provision for its payment, no stranger, though he be agent or trustee, who by express or implied agree-

ment has assumed the agency of making this payment on behalf of the debtor who furnishes the funds for that purpose, can put the funds in his pocket and set the holder of the demand at defiance. These principles are well settled by a large number of authorities, a few of which only need be examined.

That usury is a good defense for the party to the illegal agreement is universally acknowledged; and, so far as that is concerned, the mere statement of the fact is all that is called for. But in respect to other or third parties a different principle prevails; and as to them, the question should be discussed and the authorities examined.

The late Court of Chancery of the State of New York held that the surety in a usurious contract has a right to set up the defense of usury to a suit brought against him and the principal debtor in such contract, and to file a bill in equity, if necessary to establish the defense, although the principal debtor refuses to join as a complainant in the bill. But it was decided that he had no right to make the principal debtor a complainant in the suit without his consent; that the only remedy in such case was to make the party having a common interest with the complainant who wishes to file a bill for relief, a party defendant, alleging, as an excuse for doing so, that he would not consent to join as a complainant in the suit. But the principle settled by the authority, pertinent to the inquiry here, is, that the surety in the usurious contract may interpose the defense of usury as well as the principal in the contract (*Monk v. Hovey*, 9 Paige's R., 197; and *vide Dunscomb v. Bunker*, 2 Met. R., 8).

So, also, the same learned court held that the owner of land, who has given a usurious mortgage thereon, may sell or mortgage the land to another, generally, and give to the purchaser or mortgagee the same right to contest the validity of the first mortgage as he has himself. But it was declared that he may affirm the validity of the usurious mortgage by selling the equity of redemption in the mortgaged premises only, or by selling or mortgaging the land, subject, in express terms, to the previous mortgage, in which case the purchaser or subsequent mortgagee will be entitled to the equity of redemption merely, and cannot impeach the validity of the prior mortgage.

Walworth, Chancellor, said: "In the ordinary case of the giving of a usurious mortgage by the owner of the mortgaged premises,

the statute having declared the usurious security void, the owner of the premises of course has the right to sell his property or mortgage the same, as though such void mortgage had never existed. And the purchaser in such case necessarily acquires all the rights of his vendor to question the validity of the usurious security. For if the original mortgagor had not that right, the premises would, to a certain extent, be rendered inalienable in his hands, notwithstanding the incumbrance thereon was absolutely void as to him. He may, however, if he thinks proper to do so, elect to affirm the usurious mortgage by selling his property subject to the payment or to the lien of such mortgage. And the purchaser in that case takes the equity of redemption merely, and cannot question the validity of the prior mortgage on the ground of usury" (*Shufelt v. Shufelt*, 9 *Paige's R.*, 137, 145).

And the Supreme Judicial Court of Massachusetts long since decided that the purchaser of an equity of redemption cannot avoid the mortgage on the ground of the same being usurious (*Green v. Kemp*, 13 *Mass. R.*, 515; *Bridge v. Hubbard*, 15 *ib.*, 96, 103).

It was held by the late Court of Chancery of the State of New York that where a party who has confessed a judgment, voluntarily waives his defense or remedy upon the ground of usury, a subsequent purchaser of the land, upon which the judgment is a lien, cannot impeach it for usury, as where the judgment debtor filed a bill for relief, but afterward consented to a decree dismissing it with costs (*French v. Shotwell*, 5 *Johns. Ch. R.*, 555; affirmed by the Court of Errors, 20 *Johns. R.*, 668).

And the same learned court, in a later case, laid down the well settled rule, that a mere stranger cannot insist upon the invalidity of a usurious security. But it was held that the defense of usury may be set up by any one who claims under the mortgagor and in privity with him; and further, that a subsequent judgment creditor may defend upon the ground that the mortgage is tainted with usury; and that the decree in his favor, where the bill is taken as confessed by the mortgagor, is that the bill be dismissed as to the creditor, thereby waving the lien of his judgment. And it was declared and held that a purchaser of land, who takes it by the terms of his conveyance, subject to a mortgage, cannot set up usury in the mortgage to avoid it (*Post v. Dart*, 8 *Paige's R.*,

639; and *vide* *Cole v. Savage*, 10 *ib.*, 583; and *Lovett v. Dimond*, 4 *Edw. Ch. R.*, 22).

And in a still later case, in the same court, it appeared that A. bid in land at a master's sale, and had the deed made to C., upon an agreement that it should be security for a loan; and C., with A.'s concurrence, conveyed the land to S., taking his bond and mortgage for the security of the lender; and it was held that S. could not avail himself of usury in the loan (*Stoney v. American Life Insurance Company*, 11 *Paige's R.*, 635; and *vide* *Wells v. Chapman*, 4 *Sand. Ch. R.*, 312, *affirmed*, 13 *Barb. R.*, 561).

The old Supreme Court of the State of New York, in a well-considered case, laid down the rule substantially thus: A deed or contract can only be avoided for usury by the party who made it, or by some one standing in legal privity with him, and not by a mere stranger to the transaction. One who is privy in representation, as the executor, or in blood, as the heir, may set up usury; so also may one who is privy in estate, as the guarantor of him who made the usurious conveyance. In short, a mere stranger, or one who has no legal interest in the question, shall not officiously intermeddle in the matter, and take advantage of a statute which was not made for his benefit. But it was held in the case that a creditor who has obtained a judgment and execution cannot be regarded as a mere stranger. He may seize and sell the property of his debtor, and try the title of any one who sets up a prior lien or incumbrance affected by usury (*Dix v. Van Wyck*, 2 *Hill's R.*, 522; and *vide* *Jackson v. Tuttle*, 9 *Cow. R.*, 233).

And the Supreme Court of Connecticut laid down the rule that a mere stranger to a conveyance cannot avoid it for usury (*Reading v. Weston*, 7 *Conn. R.*, 409). And in a quite recent case the same court declared that it had been repeatedly held that usury is a merely personal defense; that it is optional with the debtor to take advantage of the statute or not; that the statute was intended for the protection of the debtor, and for him alone (*Loomis v. Eaton*, 32 *Conn. R.*, 550).

The Supreme Court of Alabama has very recently held, in accordance with the general rule, that usury is a personal defense; and it was declared that, within the rule, a judgment creditor of the borrower could not take advantage of usury agreed to be paid by the latter (*Barkus v. Calhoun*, 45 *Ala. R.*, 582). And in

another case, decided about the same time, the same court held that a debtor may pay a usurious debt, and convey property to the creditor for that purpose; and that the debtor alone can avail himself of the usury (*Fielder v. Vamer*, 45 Ala. R., 429).

The Court of Appeals of the State of New York, at an early day, regarded the question as well settled, that a purchaser of mortgaged premises generally, and not merely of the equity of redemption, may set up the defense of usury against the mortgage (*Brooks v. Avery*, 4 N. Y. R., 225). But quite recently, the same distinguished court declared that it had long been held, and should now be deemed settled in the State of New York, that a usurious agreement cannot be assailed by a stranger, that is, one not a party to it, nor claiming under the party injuriously affected by it (*Williams v. Tilt*, 36 N. Y. R., 319).

The Court of Appeals of the State of New York have also held that even the right of privies to the usurious agreement, to set up usury against such agreement, may be cut off by the waiver of the original party. So held in a case where it was decided that privies who accept a lien upon, or interest in, the equity of redemption of mortgaged premises, as mortgagees or purchasers, expressly subject to the lien of the prior mortgage, cannot avail themselves of usury in such mortgage, in defense to a suit for its foreclosure (*Sands v. Church*, 6 N. Y. R., 347). And the Supreme Court of the State had previously held that the defense of usury is not so personal but that the debtor's grantee may set it up, and yet held that such defense is so far personal that the debtor may waive it, and that, by granting subject to the debt, he does waive it, so that the grantee cannot avail himself of it. The language of the court is: "The defense of usury may be waived by the mortgagor or subsequent owner, so that a subsequent purchaser cannot set it up, or, in other words, he may waive it, so as to bind his grantee" (*Morris v. Floyd*, 5 Barb. R., 130; and vide *The Mechanics' Bank v. Edwards*, 1 ib., 271).

A case was decided by the late Court for the Correction of Errors in the State of New York, where the mortgagor sold the mortgaged premises, and deducted from the price agreed to be paid for the premises the amount due on the mortgage previously given by him; and it was held that the purchaser on a judgment subsequently obtained against the vendors of the mortgaged premises, who had notice that the judgment debtors had only purchased the

mere equity of redemption, could not interpose the defense of usury to the mortgage (*Ferris v. Crawford*, 2 *Denio's R.*, 598; but *vide Berdan v. Sedgwick*, 40 *Barb. R.*, 359).

The Supreme Court of the State of Indiana has held that usury cannot be set up as a defense against a mortgage by a purchaser of land subject to the mortgage; and laid down the rule that usury is a defense personal to the borrower and his heirs or representatives, and to them only; but held that if, in a suit to foreclose a mortgage tainted with usury, the borrower be made a party, he may set it up as a ground of equitable relief to himself (*Stephens v. Muir*, 8 *Ind. R.*, 352; and *vide Wright v. Bundy*, 11 *ib.*, 378).

In the State of New Hampshire it has been held that the purchaser of an equity of redemption may avail himself of the defense of usury paid by the mortgagor, in a suit of entry on the mortgage (*Gunnison v. Gregg*, 20 *N. H. R.*, 100).

It was held by the Supreme Court of Mississippi that a purchaser of a contract of land, upon which there was an incumbrance to secure a debt due from the vendor, was not bound by his contract to discharge the balance of the debt to pay more than was legally due; and that he might make the same defense as to usury that the vendor could have made (*McAllister v. Jerman*, 32 *Miss. R.*, 142).

The Supreme Court of the State of Illinois has decided, in general terms, that parties or privies to a usurious transaction have the right to avail themselves of the defense of usury (*Safford v. Vail*, 22 *Ill. R.*, 327).

It seems that in most of the cases where the grantee of mortgaged premises, or those holding under him, have not been permitted the defense of usury to a previous mortgage, are cases of conveyance by the mortgagor, where he himself has either deducted the amount of the mortgage from the price agreed upon for the premises, or has sold, in terms, subject to the mere equity of redeeming them from the lien of the previous mortgage. In such cases, it is quite obvious, upon principles of equity, that the grantee of the mortgagor ought not to set up a defense which his grantor had waived, and, by deducting from the price or value of the premises the amount of the previous mortgage, had provided him with the means of payment. Under such circumstances, it is quite obvious that the purchaser ought not to be permitted to avail himself of a statute not intended for his benefit.

A usurious contract has been held not to be absolutely *void*, but

only voidable, at the election of the borrower or those who are privies in interest or in contract with him. This doctrine has been repeatedly declared, even under the stringent provisions of the New York statute of usury; and, hence, no other party or parties than those named can be permitted to make the objection that the contract is usurious.

The Court of Appeals of the State of New York have recently laid down the unqualified proposition that the defense of usury can be set up only by the party bound by the original agreement to pay the sum borrowed, or by the sureties, heirs, devisees or personal representatives of such party.

Davies, J., delivered the prevailing opinion of the court, and, among other observations, said: "But this defense or objection to the contract, that it is void on account of usury, can only be alleged or set up by the party bound by the original contract to pay the sum borrowed, or his sureties, heirs, devisees or personal representatives (*Post v. Bank of Utica*, 7 Hill, 391; *Mechanics' Bank v. Edwards*, 1 Barb. S. C., 271). And I entirely concur in the views expressed by Barlow, Senator, in *Post v. Bank of Utica* (*supra*), where he says: 'I concede that remedial statutes are to be construed liberally, but I cannot concede that a statute is remedial which creates not only a forfeiture of the money lent, but renders the party violating its provisions guilty of a misdemeanor, and punishable by fine and imprisonment. On the contrary, it appears to me that such a statute is penal in its character, and subject to a strict construction'" (*Billington v. Wagoner*, 33 N. Y. R., 31, 34).

And the Supreme Court of Alabama has decided that statutes of usury confer a personal privilege upon the borrower, which he may waive, and that, if he does, no third party can take advantage of it (*Cook v. Dyer*, 3 Ala. R., 643). But the same court decided in a late case that, although the plea of usury is a personal privilege, intended for the benefit of the borrower, his surety or an accommodation indorser may also take advantage of it (*Gray v. Brown*, 22 Ala. R., 262).

The Supreme Court of the State of New Hampshire has held that the defense of usury is personal, and that as against a subsequent purchaser only the amount of illegal interest is to be deducted from the amount due upon a mortgage (*Ladd v. Wiggin*, 35 N. H. R., 421).

And the Supreme Court of Indiana has decided that a party in no way affected by a usurious contract, and an entire stranger to it, should not be permitted to take advantage of usury between other parties, in order to avoid a contract legal and valid, entered into by himself (*Cutchen v. Coleman*, 13 *Ind. R.*, 568). And to the same effect is a decision made by the Supreme Court of the State of Vermont, in which it was declared that laws against usury are for the protection of the borrower, and that he alone can take advantage of them (*Austin v. Chittenden*, 33 *Vt. R.*, 553; and *vide Stein v. Indianapolis, etc., Ass.*, 18 *Ind. R.*, 237; *Cain v. Gimon*, 36 *Ala. R.*, 168; *Loomis v. Eaton*, 32 *Conn. R.*, 550; *Ransom v. Hays*, 39 *Mo. R.*, 445; *Draper v. Emerson*, 22 *Wis. R.*, 147).

Upon these principles it has been expressly held that under no circumstances can the usurer himself make the objection of usury available in any suit or proceeding in which he is a party. On this point the Court of Appeals of the State of New York, by Ruggles, Ch. J., said: "The taking of usury is a misdemeanor by statute, and the agreement to take it is, in the eye and in the language of the law, corrupt. The parties; however, do not stand *in pari delicti*. It is oppression on the one side and submission on the other. The borrower, therefore, may set up usury for the purpose of avoiding a contract tainted with it; but the lender cannot. In respect to this question, usury must stand on the same footing as fraud. A fraudulent contract cannot be avoided by the party guilty of the fraud. A party to a fraud is estopped from setting it up to his own advantage; but if his opponent alleges and proves it as a part of his own case, the guilty party will then be entitled to the benefit, while he incurs the disadvantage resulting from such a state of things. * * * All the proof, therefore, offered by the plaintiff to show the bond and mortgage void for usury was rightfully excluded by the judge at the circuit" (*Lafarge v. Herter*, 9 *N. Y. R.*, 241, 243, 244).

And this precise question arose and was decided in a case in South Carolina. It was an action of debt on bond. The defense was that the defendant had conveyed certain lands to the plaintiff, in satisfaction of the bond debt. The plaintiff's answer to the defense was, that the lands were conveyed in pursuance of a corrupt and usurious agreement, by which the lands were to be reconveyed to the defendant on payment by him of the bond debt, with four-

teen instead of seven per cent interest thereon, within two years; that the conveyance of the land, being made on a usurious contract, was void, and the bond therefore unsatisfied.

Johnson, J., delivered the opinion of the court, and said: "It is a clear and well established rule of law that no one can take advantage of his own wrong. He who violates a law comes with a bad grace to ask to be restored to rights which he has surrendered by his illegal act; and for this reason he who pays money on an illegal consideration cannot maintain an action to recover it back. And what is the case here? The defendant was indebted to the plaintiff by bond. The plaintiff accepted lands in payment, and he now asks to be released from his last contract and to be restored to his rights on the bond, upon the ground that, knowingly and willingly and in violation of the statute against usury, he has annulled the debt due on the bond. According to the rule, he cannot be permitted to do so" (*Miller v. Kerr*, 1 *Bayley's R.*, 4).

The Court of Appeals of the State of New York have lately held that after an account containing, among other items, a charge of the sum paid to take up a note made by the debtor, has been rendered to the debtor, and its correctness conceded by him, and the account has become a stated account, neither the debtor nor his assignee can assail the note for usury when the same is brought forward as a set-off by the party rendering the account. And the rule was reiterated that usury is a defense personal to the party known as the borrower, and it was affirmed that he cannot transfer to another the right he has to allege and prove a demand to be usurious.

Mullin, J., who delivered the leading opinion of the court, said: "I think the assignee of the demand in suit can resist it for usury, unless his assignor has, by his acts in reference thereto, precluded him. No rule of law is better settled than that the purchaser of property, charged with a usurious lien or claim, can allege the usury and defeat the claim where the purchaser sold discharged of such usurious lien. * * * The principle must embrace personal property as well as real; and the right of the vendee to avail himself of the usury in the dealings between his vendor and a third person, touching the property, must reach every case where such third person attempts to appropriate the property purchased by virtue of any usurious contract with the vendor.

"The case before us affords a very apt illustration of the necessity

of extending the principle to this class of cases. * * * If the usury laws are to be enforced so as to prevent usury, they must not leave a door open through which the usurer can insert his finger. If an opening is left, he will soon have his whole body through. If stating an account will prevent investigation into a usurious transaction, all dealings into which usury enters will soon take the form of stated accounts, and the law be made a shield instead of a sword against violators of this wholesome and necessary law.

* * * The only way a third person can avail himself of usury is by purchasing property charged with a lien or incumbrance which is usurious, and then only in protection of his title" (*Bullard v. Raynor*, 30 *N. Y. R.*, 197, 200, 202, 203; and *vide Barrow v. Rhineland*, 1 *Johns., Ch. R.*, 550; *S. C., in error*, 17 *Johns. R.*, 538; *Bullock v. Boyd, Hoff. Ch. R.*, 294; *Phillips v. Belden*, 2 *Edw. Ch. R.*, 1; *Burke v. Avery*, 4 *N. Y. R.*, 225; *Matthews v. Coe*, 56 *Barb. R.*, 450).

But the Court of Appeals of New York, so late as September, 1871, decided and held that a grantor of real estate is not precluded from setting up the defense of usury to a prior mortgage by the recovery of a judgment against the mortgagor upon the accompanying bond, such recovery being had subsequent to his purchase. And it was further held that when the purchaser by agreement with his vendor executes a bond and mortgage to secure a portion of the purchase money equal in amount to a prior usurious mortgage upon the same premises, and places them in the hands of a third person to be delivered to the vendor if the latter succeeds in setting aside such prior mortgage; but if he fails in so doing, to be disposed of to pay off such usurious mortgage, their proceeds to be delivered to the purchaser for that purpose; this is not such an assuming of the usurious mortgage, or purchase subject to it, as will estop the purchaser from himself setting up the usury (*Berdan v. Sedgwick*, 44 *N. Y. R.*, 626). These are important considerations, and not entirely impertinent to the point under consideration.

By a statute of the State of New York, passed in 1850, the contracts of corporations borrowing money and agreeing to pay more than seven per cent interest are legal and binding upon them; and the Court of Appeals of the State have held that the guarantors of such contracts are liable upon their contracts of guaranty. In other words, that when upon a loan of money to a corporation,

the defense of usury is unavailing to the corporation, it is also unavailing to its sureties (*Rosa v. Butterfield*, 33 N. Y. R., 665). The Supreme Court of the State of New York has decided that the assignees of a debtor, who have accepted the trust created by an assignment for the benefit of creditors, have no right to refuse the payment of a debt, specifically directed to be paid in the assignment, on the ground of its being usurious, in the absence of any request or authority to them from the assignor, or from any creditor provided for in the assignment to refuse such payment, and where the assignees are not themselves creditors of the assignor. And this upon the principle that the defense of usury can only be set up by a party to the usurious contract, or one who represents him, as a privy in blood or in estate (*Green v. Morse*, 4 Barb. R., 332).

The same learned court held in a later case, where it appeared that a trust estate, being encumbered by a valid mortgage, upon which a decree of foreclosure had been obtained, the trustees effected a loan from a corporation, for the security of which the mortgage and decree were assigned to the lender who paid the mortgagee's demand; the mortgage was not discharged, but was kept on foot for the benefit of the lender; the loan was usurious, and was illegal, as being contrary to the charter of the corporation; that notwithstanding the usury and illegality of the loan the mortgage and decree remained valid, and were neither extinguished nor merged, but were unaffected by the usury and illegality of the contract upon which they were assigned. And it was also held that the trustees could waive the usury and illegality for the benefit of the estate; and that having procured a transfer of the mortgage and decree from the corporation, they could enforce the same (*Wells v. Chapman*, 13 Barb. R., 561).

So, also, the same court held, in a very late case, that a chattel mortgage can be avoided for usury by a judgment and execution creditor of the mortgagor. And it was declared that a person who, like an execution creditor, asserts a lien upon mortgaged property is not a stranger, within the meaning of the rule that the defense of usury is a personal one, and cannot be pleaded by one having neither privity of estate nor of blood with the borrower; that is to say, by a mere stranger (*Carden v. Kelly*, 59 Barb. R., 239). This is in accordance with the decision of a case in the Court of Appeals of the State, wherein it was held, in general

terms, that any party having a lien on a chattel may avoid for usury a mortgage claiming priority (*Thompson v. Van Vechten*, 27 *N. Y. R.*, 568). And this is also in harmony with the doctrine laid down in a well considered case decided by the old Supreme Court of the State, and among the very last of the cases decided by that distinguished court. (*Schroepfel v. Corning*, 5 *Denio's R.*, 236).

So, also, the Superior Court of the city of New York has declared that where an action is brought at law on a contract, or in equity upon securities which are collateral to the contract, either the one owning the property, or having a lien thereon by mortgage or execution, may interpose the defense of usury where it exists, as a matter of strict right (*Vide Chamberlain v. Dempsey*, 14 *Abb. Pr. R.*, 241; *S. C.*, 9 *Bosw. R.*, 212). This was so held at the General Term of the Superior Court; but the Court of Appeals reversed the judgment of the General Term, and affirmed the final judgment of the Special Term; thus confirming the rule as heretofore laid down, that no one but a party to a usurious loan, or his heirs, devisees or personal representatives, can avoid a usurious contract on account of usury (*Chamberlain v. Dempsey*, 36 *N. Y. R.*, 144; and *vide Bullard v. Raynor*, 30 *ib.*, 197, 206; *Hartly v. Harrison*, 24 *ib.*, 170; *Ohio and Mississippi Railroad Company v. Kasson*, 37 *ib.*, 218). It is held that any party having a lien on a chattel may avoid for usury a mortgage claiming priority (*Thompson v. Van Vechten*, 27 *N. Y. R.*, 568). And the same rule applies in case of mortgages of real estate (*Mutual Life Insurance Company of New York v. Bowen*, 47 *Barb. R.*, 618).

The Court of Appeals of the State of Maryland has held that an assignee in legal privity with the mortgagor might avoid the contract for the excess of usury, and is entitled to the proper reduction on the mortgage debt (*Banks v. McLellan*, 24 *Md. R.*, 62).

Akin to this same doctrine is that laid down by the Court of Appeals of the State of New York, in a case recently decided, in which it was declared that an assignment of a lease, which assignment was absolute on its face, but in fact given as security for a usurious loan, may, in the hands of a purchaser of such lease from the usurious assignee, with notice that the original assignment was security for a loan, although without notice of its usurious character, be avoided for usury, by a judgment creditor of the

original lessee. And it was held that one holding a sheriff's deed given upon a sale of the interest of the lessee, under judgment and execution against him, may maintain ejectment against such purchaser in possession of the premises under his purchase from the usurious assignee of the lease; and that this was so where the judgment was previously perfected, although the purchase of the lease was effected by payment to the usurious assignee, a reassignment by him to the lessee, and assignment from the latter direct (*Mason v. Lord*, 40 *N. Y. R.*, 476; and *vide Post v. Dart*, 8 *Paige's R.*, 632; *Dix v. Van Wyck*, 2 *Hill's R.*, 522).

But the Court of Appeals of the State of New York, as late as September, 1871, held that, in an action for the foreclosure of a mortgage upon real estate, an answer alleging that the defendant having entered into a contract with the plaintiff for the purchase of the premises, made a usurious agreement with one D., by which, in consideration of usurious loans, he transferred his interest in the contract and directed the plaintiff to convey to D., who with the defendant's consent, executed the mortgage in question as security for purchase-money, and that the plaintiff had notice of such usurious agreement before he took the mortgage, but without alleging that the plaintiff was a party to or in any way benefited by the agreement with D., states no defense. It was declared that the usury, as between the defendant and D., could not be set up to defeat or delay the plaintiff's right under the mortgage which he received with the defendant's consent, and to recover moneys justly due (*Kay v. Whittaker*, 44 *N. Y. R.*, 565).

The doctrine seems to be well settled by the authorities that a party having no connection with the usury, who, by the direction of the mortgagor of a usurious mortgage, conveys to the assignee of the mortgagor and receives a mortgage for the money justly due him, cannot be affected by the usury between the original mortgagor and his assignee; that such usury cannot be set up to defeat the mortgage of the party first named. And the rule is a familiar one that where the owner of land mortgages it to secure the payment of a debt, and afterward sells and conveys the equity of redemption subject to the lien of the mortgage as a portion of the purchase-money, the latter becomes personally liable for the payment of the debt of the former to the holder of the mortgage, and in such case it is, therefore, quite clear that the purchaser of the

mortgaged premises cannot set up the defense of usury against such mortgage, and thus obtain an interest in the land which the mortgagor never agreed or intended to transfer to him. Several of the authorities heretofore examined hold to the doctrine in the plainest possible terms, and other cases need not be referred to on the point.

In the State of Iowa, in a case before the Supreme Court, it appeared that the defendant gave a note (usurious) in part, secured, by trust deed of real estate. The mortgage was foreclosed. Afterward the agent of the mortgagor negotiated for the resale of the property at the amount of the usurious note with interest. The mortgagor paid down the greater part of the price, and gave his own note to the agent for the balance; and the court held that the maker of this last note could not avail himself of the defense of usury to defeat a recovery upon it (*Switz v. Platz*; 15 Iowa R., 362).

The old Supreme Court of the State of New York held, where a bond was given conditioned to save harmless and indemnify the obligee against his liability as the maker of a promissory note then held by a third person, and to pay the same or cause it to be paid, that the obligor in the bond could not, in an action upon it, set up usury in the note.

Beardsley, J., in his opinion, said: "The defendant had no right to set up that the note was usurious, although the defense might have been interposed by the plaintiffs in the action brought against them on the note. This bond was given to the plaintiffs, by whom the note had been made, and not to the supposed usurer, whoever he may have been, nor was the payment to be made to such supposed usurer; for the note, as the condition of the bond shows, had been transferred to Clark & Sharp, who then held it, and the obligors were bound that it should be paid without delay. Their engagement to the plaintiffs was equivalent to an absolute promise to pay them the amount of the note; and on no principle can I see that the obligors in the bond had any concern with the question of usury. Their engagement was with the plaintiffs. It was an engagement to pay the amount of a certain note given by the plaintiffs and then held by Sharp & Clark, and, in my opinion, the defendants were clearly bound to meet the payment according to their covenant, whether the plaintiffs were liable to Sharp & Clark or not. What concern had these obligors with

that question? They were not the victims of a usurer, nor were they held upon a usurious obligation. If the bond had been a mere bond of indemnity, a different question would have been presented; but being an absolute engagement to *pay*, I entertain no doubt that the alleged defense of usury was properly excluded" (*Churchill v. Hunt*, 3 *Denio's R.*, 321, 324, 325).

From the authorities, it seems to be decided that the policy of the statute of usury is the protection of borrowers against oppressive exactions by lenders. It is not essential to the promotion of this policy that other persons than the victims of the usurer or persons standing in legal privity with him should have the benefit of the statute, and hence the rule that the objection of usury cannot be raised by a mere stranger to the usurious transaction. And it has been expressly declared that if the borrower prefers, for any reason, to abide by his agreement, he will be permitted to do so. He will not be compelled to accept the aid of the statute of usury against the convictions of his judgment and conscience, and whenever he has waived the benefit which the statute prefers, no one else can make it available in his place (*Vide, further, Murray v. Barney*, 34 *Barb. R.*, 336).

In several of the States, as in New York, statutes exist declaring that no corporation shall interpose the defense of usury in an action. And where this is the law, it is held that the prohibition extends not only to the corporation itself, but that it bars equally an accommodation indorser of a corporation; in other words, when upon a loan of money to a corporation the statute makes the defense of usury unavailing as to the corporation, it is also unavailing to its sureties. The effect of the statute would seem to be, that the contracts of corporations, where such a statute exists, can in no case be usurious, and hence the guarantors of such contracts are the guarantors of legal contracts; and if so, of course, they cannot interpose the defense of usury in an action to enforce them (*Vide Rosa v. Butterfield*, 33 *N. Y. R.*, 665).

And it has been held that such an act will estop the receiver of a corporation, which represents both the corporation and its creditors, from interposing the defense of usury against the obligations of the corporation (*Curtis v. Leavitt*, 15 *N. Y. R.*, 230, 296). Indeed, it is held that such an act operates *pro tanto* as a repeal of the statutes prohibiting usury, so far as they are applicable to stipulations for a rate of interest exceeding a legal rate, where a

corporation is the borrower (*Belmont Branch Bank v. Hoge*, 35 N. Y. R., 65).

In some cases parties to usurious paper may be *estopped* from interposing the defense of usury in an action brought to enforce it by reason of representations which they may have made in respect to the character of the paper, on which innocent parties may have acted. For example, when a party to accommodation paper sells it as business paper at a usurious discount, it has been said that he is estopped from setting up and proving that the paper was not of the character represented. That is to say, it has been repeatedly held by the courts of New York that the doctrine of estoppel applies to one who represents a note which he is about to sell to be business paper, when, in fact, it is not, so as to preclude him from setting up the defense of usury. The late Chancellor Walworth is reported to have said, in a case decided by him in the late Court of Chancery of the State of New York, "that when the holder and apparent owner of negotiable securities sells them at a discount to a *bona fide* purchaser, who has no knowledge of the purposes for which such securities were made, the holder representing such securities to belong to himself and to be business paper, the transaction was not usurious as between the vendor and vendee; although the representation of the vendor was false and the securities were, in fact, made for the sole purpose of being sold at a usurious discount in the market" (*Holmes v. Williams*, 10 *Paige's R.*, 326).

But, with deference, it may be suggested that the statement of the learned chancellor does not contain quite enough to constitute an estoppel in the case supposed. The principle upon which an estoppel *in pais* is permitted, requires the additional fact in the case suggested that the representations were made with the design to influence the conduct of the purchaser and to induce a purchase of the securities; and that the purchaser confided in, and in good faith acted upon the representations. That is to say, the party must have been actually deceived by the representations, and acted under that deception. Where all these facts exist, the party transferring the security cannot be heard to set up usury to defeat a recovery upon any obligation which he may have assumed on making the transfer. This doctrine is clearly deducible from a well considered case decided by the present Supreme Court of the State of New York soon after it was organized, in which the prevailing

opinion was delivered by Sill, J., and the whole question fully examined and discussed (*Vide Truscott v. Davis*, 4 Barb. R., 495. *Ferguson v. Hamilton*, 35 *Ib.*, 427).

The old Supreme Court of the State of New York held, incidentally, that when the payee of a usurious negotiable promissory note sold the same and informed the holder that it was business paper, and guaranteed the payment of it, in a suit upon the guaranty he could not set up usury to defeat a recovery (*Dowe v. Shutt*, 2 *Denio's R.*, 621). And Justice Clerke remarked, in giving the opinion of the present Supreme Court of the State in a case before the General Term of the first judicial district: "It has been settled in this district at General Term that a party to accommodation paper who sells it as business paper at a usurious discount, is estopped from setting up usury as a defense. It is not necessary or proper to consider the reasoning and principles upon which this decision was founded. Although I took no part in it, I shall, of course, deem it obligatory upon all the members of the court" (*Jackson v. Fassitt*, 33 Barb. R., 645, 647).

The learned judge does not give the title of the case to which he refers, but he doubtless has reference to a case decided in 1858, where it appeared that the maker of a promissory note annexed thereto a certificate that the note was given for value and would be paid when due; and the note was afterward sold to a third person for an amount less than should have been paid for it if discounted at legal interest, and the court held that the maker was estopped by the certificate from setting up the defense of usury.

Ingraham, J., delivered the opinion of the court, and said: "It has been repeatedly held, and must be considered as the settled law of this court until otherwise decided by the Court of Appeals, that the doctrine of estoppel applies to one who represents a note, which he is about to sell, to be business paper, when, in fact, it is not, so as to preclude him from setting up the defense of usury. * * * In the present case no one but the defendant, who is both maker and indorser, is affected by the application of the rule; and there is no hardship or injustice in saying to him that he cannot deny now what he represented the note to have been when the plaintiff was induced to purchase it. A contrary rule would hold out to men a temptation to deceive others by falsehood, and then allow them to take advantage of such falsehood to escape the liability so incurred" (*Chamberlin v. Townsend*, 7 Abb. Pr. R., 31; S. C.,

26 *Barb. R.*, 611). The case is mistakenly reported in *Barbour* as having been decided at Special Term, whereas it was disposed of at General Term, as reported in *Abbott*. No other case of the tenor and effect stated by Judge Clerke seems to be reported as having been decided in the first district; and it will be observed, from the opinion of Judge Ingraham, that this case does not stop quite as short as is supposed by Judge Clerke. It is plainly to be inferred, at least, that the certificate in the case was annexed to the note to induce the purchaser to take it; and that the purchaser, in good faith, relied upon the representations contained in the certificate, and took the note upon the strength of them.

But the Court of Appeals of the State of New York have decided that, to estop the parties to a bill of exchange by their representations in respect to its consideration and validity, such representations must be outside of the face of the bill; that is to say, that the recital in the bill of value received, and its indorsement, did not estop the acceptor or the indorser from proving that the acceptance and indorsement were for the accommodation of the drawer, and that the bill had no inception until its usurious discount by the plaintiff.

The learned counsel for the plaintiff labored ingeniously to bring the case within the rule in respect to estoppels in cases of usury; arguing that if a party misrepresents facts, or, by his silence, allows another to act upon a mistake of facts, he is thereby estopped from setting up those facts afterward to the prejudice of the person who has been misled; that his silence binds him upon the same principle as if he had, by express misrepresentation, misled the other party; and that in both cases he is estopped upon equitable principles from denying the truth of the facts upon which the other had been induced by such misrepresentations or silence to rely. But the court did not think the doctrine applicable, in cases of usury, to the extent argued by the counsel.

Comstock, Ch. J., in rendering the opinion of the court, said: "It is true that the words 'value received' were a part of the instrument; and these words imported that the bill was drawn and accepted for value in the hands of the drawer or acceptor. It may also be assumed that the plaintiffs supposed they were purchasing an obligation which bound the parties before they advanced their money upon it. But these circumstances do not relieve the case. Neither the drawer nor the acceptor made any representations to

the plaintiffs beyond the language contained in the contract itself. But if the very words of a contract are to be taken as a representation of facts which estops the party who makes the obligation from interposing a defense inconsistent with that representation, then all contracts must be deemed valid which appear to be so on their face; and not only usury, but duress and fraud, can no longer be alleged. Such is not the rule of law" (*Clark v. Sisson*, 22 *N. Y. R.*, 312, 316).

The Supreme Court of Iowa has held that the maker of a usurious note is estopped from setting up the defense of usury thereto against one to whom he has assigned it, representing that "it was all right, and no usury in it," unless the assignee did not believe the representation (*Callanan v. Shaw*, 24 *Iowa R.*, 441).

These authorities indicate very clearly the cases in which usury may be interposed as a defense to an action, and the parties by whom a usurious contract or security may be impeached. The general principles upon the subject are well settled, and there need be little or no doubt in respect to their application to any given case, by a reference to the authorities cited, or rules extracted from them, and here given.

CHAPTER XXXII.

THE PENALTIES OF USURY, AND ACTIONS AT LAW AGAINST THE USURER—THE ACTION AT LAW TO RECOVER BACK USURIOUS INTEREST—WHEN PROPERTY DEPOSITED OR TRANSFERRED UPON USURIOUS CONTRACTS MAY BE RECOVERED.

THE actual penalties of usury are given by statute, but an action is given, under certain circumstances, to the borrower against the party taking the illegal interest. The forfeitures created by statute in cases of usury may be regarded as penalties, as they are always penal in their results; but other actions are given, besides the action for the forfeiture, in cases where the usury is actually paid.

A party who has paid excessive interest may, at common law, recover the excess, in an action for money had and received. The law considers the borrower rather as a victim than an aggressor. Statutes are passed prohibiting usury, in order to protect needy and necessitous persons from the oppression of usurers, who are eager to take advantage of the distresses of others, and who violate the

law only to complete their ruin. At least, this is the theory on which these enactments are made. In such case, therefore, the maxim of *potior est conditio defendantis*—the defendant's condition is the more preferable—has never been applied. This doctrine is well settled. But the party injured by the exactions of the usurer cannot, at common law, recover any part of the principal and interest; and, to entitle him to maintain his action, he must show that he has done all that equity requires (5 *Bacon's Abr.*, tit. *Usury*, G). And it seems that when the statute gives the remedy, without a negation of the common-law remedy by the statute, either express or implied, the party aggrieved may resort to his common-law remedy, instead of the remedy given by the statute, if he prefers to do so.

As before suggested, when a person seeks to recover back excessive interest, he must pay the principal and legal interest before his action can be sustained. That is to say, when he has paid the *excess* merely, and any part of the principal and legal interest remains unpaid, the action for the excess will not be entertained. But oftentimes this rule is changed by the statute. This, however, will be referred to in another connection.

The statutes of New York authorize any person or his personal representatives who shall, on any loan or forbearance of money, have paid or delivered any greater sum than is allowed by law, to recover from the person to whom the same was paid, or by whom the same was received, the amount so paid, provided the action is brought within one year after such payment (1 *R. S.*, 772, § 3; 1 *Stat. at Large*, 725, § 3). And if such suit is not brought within the year, then the said sum may be sued for and recovered with costs at any time within three years after the said one year, by any overseer of the poor of the town where such payment may have been made, or by any county superintendent of the poor of the county in which the payment may have been made (1 *R. S.*, § 4; 1 *Stat. at Large*, 726, § 4).

This statute does not take away the common-law remedy of the borrower, but it has been held that such remedy is suspended during the three years given to the overseer or county superintendent of the poor to bring the action; for both the common-law and statute remedies cannot be resorted to (*Vide Wheaton v. Hibbard*, 20 *Johns. R.*, 290). And if the borrower fails to bring his action within the first year, and the official person above named shall

prosecute under the statute within the three years specified, the borrower's right to bring the action may be lost, because the usurer is only liable to one action for the excessive interest taken. But before the action shall be commenced by such official, the borrower may bring his suit within the three years, and at any time within the general limitations of action. His right to the excessive interest is fixed by bringing suit, and such official cannot afterward sue, though within the three years (*Palmer v. Lord*, 6 *Johns. Ch. R.*, 95).

The old Supreme Court of the State of New York, in the case of *Wheaton v. Hibbard*, held that the statute of 1787, which was substantially the same as the present statute of the State, giving to the party paying usurious interest the right to sue for and recover the excess within *one year* after such payment, did not take away the common-law remedy of the borrower to recover such excess, as has been before suggested. But Justice Spencer, delivering the opinion of the court, said: "The injured party cannot have both remedies, and if he neglect to pursue the statute remedy for more than a year, his right of action at common law would be *suspended* during the second year, for, peradventure, a third person may prosecute."

The present Supreme Court of the State seems to have vibrated somewhat upon this question. The court, at a General Term held in the seventh judicial district in 1863, decided that the provision of the statute is *cumulative*, and does not take away the common-law remedy of the borrower, and that he may bring his action to recover the excess of interest paid by him at any time within six years after the sum was paid (*Porter v. Mount*, 41 *Barb. R.*, 561).

On the contrary, the Supreme Court, at a General Term held in the first judicial district in 1866, decided that usurious interest cannot be recovered back except under the statute, and that unless the action to recover it back is brought within the time prescribed by the statute, that is to say within one year from the time of payment, it cannot be sustained.

George G. Barnard, J., who delivered the opinion of the court, said: "I do not understand that usurious interest may be recovered back without this statute. Usury is created by statutes. Penalties are given and rights of action created by statute for violation of the usury laws. The case of *Wheaton v. Hibbard* (20 *Johns.*, 290) was decided under a different statute from the present one. One

portion of the opinion in it is questioned in 41 Barb., 561; the first case holding that the plaintiff's right of action was suspended after one year, for the next three years, when the overseers may sue, and the latter case holding that the plaintiff may sue until the overseers do sue. It seems to me quite plain that neither case can be upheld under *Meech v. Stover* (19 N. Y. Rep., 26). A right is in that case held vested, because given by statute. 'If the right is not asserted within the time, it is gone.' The overseers may then sue. They have a vested right, upon the same principle" (*Palen v. Johnson*, 46 Barb. R., 21, 23, 24).

In the case of *Porter v. Mount* (41 Barb. R., 567), Justice James C. Smith regards the remark of Judge Spencer, in *Wheaton v. Hibbard* (20 Johns. R., 290), as *obiter dictum*, and he is inclined to think is not wholly correct. He thinks the borrower's common-law right of action is not *absolutely* suspended during the three years given to the public officers by the statute; but that he may sue during that period, *provided* neither of such officers has previously sued for the *same* matter, and not otherwise. This is in harmony with the doctrine laid down by the chancellor in the case of *Palmer v. Lord*, before referred to. But the two cases in Barbour are entirely in conflict, one with the other, upon the other question, as to whether the statute supersedes the common-law remedy of the borrower to recover back the usurious interest paid; and they are both General Term decisions, and each decided by three judges, and each decision seems to be concurred in by the full bench.

The case of *Meech v. Stover*, in the New York Court of Appeals, which Judge Barnard considers conclusive against the decision in the 41st of Barbour, arose under the statute against betting and gaming; and Judge Comstock, who wrote the opinion in that case, said: "If the statute had not given an action to recover money lost at play, it is quite certain that on general principles of law a suit for such a purpose could not be maintained."

This he holds, on account of the maxim recognized in such cases, as "*in pari delicto potior est conditio defendentis*;" that is to say, where both parties are equally in fault, the condition of the defendant is the more preferable. The defendant having the money won is permitted to keep it, because the law will not be heard in the particular case. But it has been expressly held, and it is believed never controverted, that this maxim does not apply

in a case of usury; and it has frequently been held, and perhaps never controverted, that the borrower has his remedy at common law for usurious interest paid by him, without the aid of any statute. The case of *Butterworth v. O'Brien* (23 N. Y. R., 275), which Judge Barnard also thinks favors his position, simply decides that the act of the legislature repealing the defense of usury, as to banks, has the effect to deprive banks of the benefit of the statute, and besides that, a corporation cannot maintain an action to recover back money paid by them in excess of legal interest. In other words, it cannot be said that there is any usurious interest as to a corporation, and if this is so, a corporation cannot most certainly sustain such an action. But these are the two conflicting decisions of the Supreme Court of the State upon the point, and consequently the question cannot be considered settled until it shall be passed upon by the Court of Appeals.

The Supreme Court of Alabama held that the act of 1819, of that State, which prescribed the rate of interest and prohibited the taking of usury, impliedly abrogated the common law, which allowed the borrower to recover back, in *indebitatus assumpsit*, all interest he had paid above the rate prescribed; and that since the passage of the statute, he could only maintain a *qui tam* action in such case, and then the amount reserved by him was required to be paid into the treasury for the use of the State (*Carlisle v. Gray*, 10 Ala. R., 302).

The Supreme Court of Pennsylvania has held that a payment of usurious interest was not such a voluntary payment as would entitle the receiver to retain it; that in such case, the money is paid under the constraint of a forced, though illegal contract, obtained by oppression, and by taking advantage of the necessities of the borrower; and that therefore the same may be recovered back by action. And the court declared that, to enable the borrower to recover back a sum paid for usurious interest, other evidence of duress or oppression is necessary than is involved in the act itself of taking the money under a usurious contract (*Philanthropic, etc., Association v. McKnight*, 35 Penn R., 470). And the Supreme Court of Texas laid down substantially the same doctrine, in a case where the usurious interest was allowed as a set-off, or appropriated to the reduction of the principal (*Ware v. Bennett*, 18 Texas R., 794); while the Supreme Court of Illinois decided that usurious interest, once voluntarily paid, cannot be

recovered back as money advanced or received. The ground upon which the decision was based was, that the Illinois statute gives a defense for usury, but not a cause of action; and one of the judges dissented from the decision (*Hadden v. Innes*, 24 Ill. R., 381). The Supreme Court of Wisconsin decided that the borrower may recover the amount paid for usury in an action for money had and received, after the lapse of the year within which he can recover under the statute threefold that sum, and that he may also off-set it in a suit brought for the recovery of the principal (*Wood v. Lake*, 13 Wis. R., 84).

By the former statute of Massachusetts, a party paying usurious interest was permitted to recover of the usurer *threefold* the amount of interest paid (*Revised Statutes*, ch. 35, § 3). This is different from the remedy at common law, and, of course, a party who had paid a greater rate of interest than allowed by law, could not recover back the threefold amount of interest paid, except in the manner and form prescribed by the statute (*Wiley v. Yale*, 1 Met. R., 553).

The Supreme Judicial Court of Massachusetts decided that neither the giving of a negotiable note in settlement of an account which contained a charge for unlawful interest, nor the giving of a memorandum check in settlement of the note, was such a payment of unlawful interest as would enable the party giving the note and check to recover back threefold the amount of interest paid in an action on the statute of the State above referred to (*Stevens v. Lincoln*, 7 Met. R., 525).

And it was held, under the North Carolina statute against usury, that the penalty given by the statute could not be recovered, unless the usurious interest or some portion of it had been actually received, either in money or money's worth (*Stedman v. Bland*, 4 Ired. R., 296). But it was held that in the action to recover such penalty, it was not necessary to prove that the principal money had been paid (*Seawell v. Shomberger*, 2 Murph. R., 200).

And the court held in another case, where payment of usurious interest, or of a usurious contract, was made by the note of a third person, that the usurious contract was complete before the note became due. So that the statute penalty for usury could be recovered (*Cavaness v. Noy*, 10 Ired. R., 315).

Under the Vermont statute it was decided that although the payment of usury upon a note would, in law, be deemed a part

payment of the note, if the note included both the money loaned and the usury, whether at the time of negotiating the loan or afterward, and the usury, when paid, was applied upon such securities, the debtor was at liberty to treat such a payment as having no connection with the legal demand, and bring his action to recover it back (*Nichols v. Bellows*, 22 *Vt. R.*, 581).

In the State of Georgia it was held that if a surety to a usurious contract pays usurious interest, knowing it to be such, he cannot recover it back from his principal (*James v. Jeyner*, 8 *Geo. R.*, 562).

Usurious interest was paid upon a note executed in Ohio, in 1846, payable in thirty days, and it did not appear that it was paid before September, 1850. The legislature of Ohio passed an act which took effect March 1, 1848, by which usurious interest might be recovered back, or set off. In a suit brought in Indiana on the note, the Supreme Court of the State held that the usury might be set off against the note, both at common law and under the statute of Ohio (*Smead v. Green*, 5 *Ind. R.*, 708).

Where a contract was made in Massachusetts, alleged to be usurious by a statute of that State, which provided that a deduction of threefold the amount taken should be made from the sum found due, an action was brought upon the contract in the State of New Hampshire, and a plea of usury under the statute was interposed. The court held that the statute, applying to the remedy merely, could not be enforced in New Hampshire; declaring, in general terms, that statutes against usury, which apply only to the remedy, can be enforced in those States only where the contract is made (*Watriss v. Pierce*, 32 *N. H. R.*, 560).

In the State of Louisiana it was held that, under the statute of 1844 of that State, money paid for usurious interest could be reclaimed if suit was brought within one year after the payment (*Keane v. Brandon*, 12 *La. An. R.*, 20). And the same court held that where usurious interest was stipulated before the passage of the act of the 20th March, 1856, "relative to the rate of interest," but paid since the promulgation of that act, the whole of the interest paid could be recovered back under the second section of the act of February 19, 1844; that the contract relative to interest was void at the time it was entered into, and that it remained unaffected by the subsequent law in existence when the payment was made (*Merville v. Le Blanc*, 12 *La. An. R.*, 221).

The Supreme Court of Ohio has decided that where usurious interest has been paid, the borrower may waive the forfeiture, and require such excess to be applied to the payment of the legal interest (*Lockwood v. Mitchell*, 7 Ohio N. S. R., 387).

Under the Massachusetts statute before referred to, the Supreme Judicial Court of that State held that one who, in consideration of a loan of money, gave his note for a larger amount, bearing interest and secured by a mortgage on real estate, and afterward conveyed the real estate to one who agreed, as part of the consideration of the conveyance, to pay the amount of the note, might, upon the grantee's paying the note accordingly, maintain an action on the statute against the payee of the note, to recover three times the excess of the amount of the note above the loan (*Cunningham v. Hall*, 7 Gray's R., 559). But the same learned court held that the giving of a negotiable note for \$1,000 and interest, with collateral security, for a loan of \$900, and the payment of interest thereon at the legal rate annually on the \$1,000 for two years and a half, and of part of the principal, were not such a payment of unlawful interest as would enable the party to maintain an action to recover back threefold the amount of unlawful interest paid.

Bigelow, J., delivered the opinion of the court, and said: "This case clearly comes within the principle laid down in *Stevens v. Lincoln* (7 Met., 525). The *locus pœnitentiæ* still remains open to the defendants. They may hereafter relinquish their claim to the unlawful interest, and surrender the note and mortgage which they received from the plaintiffs, without receiving anything more than the original sum of \$900 which they actually advanced to the plaintiffs, with lawful interest thereon. In that event, no usury will have been received by them. The payments already made by the plaintiffs have been appropriated by the parties in payment of the lawful debt, and not in satisfaction of the claim of usurious interest. If there had been no appropriation of those payments, the law would apply them in payment of the lawful rather than of the illegal demand" (*Saunders v. Lambert*, 7 Gray's R., 484, 486).

In the Court of Appeals of the State of Kentucky, a case was decided, in which usury in the debt sought to be collected was known to the party before the judgment by ordinary proceedings was rendered against him, and was then available as a defense either at law or in equity; he failed to rely upon it, however, but sought an injunction or modification of the judgment to the extent of the

usury. The court held that he was not entitled to the relief sought ; but decided, nevertheless, that if he had paid the usury he might sue for and recover the amount from the party receiving it (*Chinn v. Mitchell*, 2 *Met. R.*, 92).

In the State of Michigan the Supreme Court has decided that the statute concerning usury, in force in that State, does not contemplate the recovery back or allowance of unlawful interest once paid, unless in a suit upon the contract under which it was exacted ; that the statute does not absolutely avoid contracts for usury, and that if parties perform them they are remediless (*Smith v. Stoddard*, 10 *Mich. R.*, 148). The same is decided to be the law in the State of Iowa. Usurious interest once paid in that State cannot be recovered back (*Smith v. Coopers*, 9 *Iowa R.*, 376 ; *Nichols v. Skeel*, 12 *ib.*, 300). And the law is held to be the same in Illinois (*Tompkins v. Hill*, 28 *Ill. R.*, 519 ; *Manney v. Stockton*, 34 *ib.*, 306).

It has been held by the Supreme Court of the State of Illinois that a mortgagor cannot maintain an action to recover usurious interest collected by the sale of the property under a power of sale in the mortgage. That the payment was involuntary, was held not to help the mortgagor (*Perkins v. Conant*, 29 *Ill. R.*, 184).

In the State of Vermont, in an action to recover back money paid as usury, it appeared that the defendant agreed to obtain a loan of money for plaintiff, and did obtain it of H. at a usurious rate of interest, and that he received seventy-five dollars from the lender as a part of the transaction. Subsequently he purchased the plaintiff's note of H. and the plaintiff paid him the principal and usurious interest. H. admitted that he received one-half of the extra interest included in the note, and settled with the plaintiff therefor. The court held that the defendant was a party to the usurious contract, so as to be liable to repay the usury he had received. It was declared that the plaintiff's cause of action accrued when the defendant received the seventy-five dollars from H. (*Williams v. Wilder*, 37 *Vt. R.*, 613).

The Supreme Judicial Court of Massachusetts decided that a usurious lender does not subject himself to the statute penalties for usury if he actually receives no more than the sum lent, with lawful interest. But upon a bill in equity to redeem a mortgage made to secure a usurious contract, the court held that if the defendant by his answer claims the performance of such contract,

the mortgagor is entitled to a deduction of the forfeiture for usury from the amount due from him upon the contract (*Smith v. Robinson*, 10 *Allen's R.*, 130).

The Supreme Court of Missouri has decided that if a party *voluntarily* pays interest as usury, an action cannot be maintained for its repayment (*Ransom v. Hays*, 39 *Mo. R.*, 445).

The Supreme Court of the State of Wisconsin has held that under a statute which provides that no interest shall be recovered upon usurious contracts where money has been paid as interest at an illegal rate, only the excess above the legal rate can be recovered in a common-law action for money had and received, or set-off by the borrower in an action for the principal, nor will equity enforce the forfeiture except for such excess (*Fay v. Lovejoy*, 20 *Wis. R.*, 403).

It was held in Tennessee that no creditor or surety has made out a title to recover the usury he has paid, until he has established his demand by judgment at law or decree in equity. And that, until this is done, his bill or suit for the usury under section 1955 of the Code of the State, providing for the recovery of usurious interest paid, is wholly unwarranted (*Battle v. Shute*, 3 *Head's R.*, 547).

It has been decided in the State of Georgia that the right of a debtor to recover back usurious interest paid by him is a personal privilege, and not a right which a surety of such debtor has a right to set up by way of set-off to the debt on which he is liable as surety (*Mordecai v. Stewart*, 37 *Ga. R.*, 364).

But the remedy of the borrower who pays usurious interest is not always confined to his action for the recovery of the excess in money. For example, when in a usurious contract the delivery of personal property by the borrower to the lender is a part of the transaction, it seems to be settled that the possession of such property by the lender is regarded as tortious from the beginning, and that trover will immediately lie against him at the suit of the borrower without a demand or other evidence of a further act of conversion. In accordance with this doctrine the old Supreme Court of the State of New York held, where it appeared that the defendant lent money to the plaintiff, and to secure usurious interest sold to him at the same time certain real estate at an exorbitant price, and for a part of the amount to be paid received from the borrower, at the time of the loan, an assignment and delivery of

several bonds and mortgages, that the act of receiving the bonds and mortgages was a conversion by the defendant, and that trover by the borrower, brought after six years from such delivery, was barred by the statute of limitations; and the doctrine was laid down that the law regards everything done by a borrower to obtain money upon usurious terms as involuntary, and the result of constraint and compulsion.

Beardsley, Ch. J., in his opinion, said: "The contract upon which these securities were received by the defendant, being usurious, was wholly void, and he thereby acquired no right to them (1 R. S., 772, § 5). Nor was his possession, although by manual delivery from the plaintiff, a rightful possession. On the contrary, it was not only acquired in violation of positive law, but, as respects the plaintiff, was compulsory and oppressive. The law regards whatever is done to obtain money on usurious terms, not as a voluntary act, but as the direct result of constraint and violence on the part of the usurer. The borrower on such terms is the slave of the lender; nay, more, a slave in chains, and utterly incapable of resistance. As to the usurer, anything is held to be oppressive and tyrannical to which an unresisting and passive submission is yielded by his victim. It is on this principle alone that the law gives redress to one who submits to usurious exactions. He is not looked upon as a free agent, nor as a violator of the law. And to such a case the maxims *volenti non fit injuria*, and *in pari delicto potior est conditio defendentis* have no application" (*Schroepffel v. Corning*, 5 Denio's R., 236, 240, 241).

This doctrine is well sustained by the English courts. In an action brought in the English Common Pleas to recover in trover for goods deposited to secure a usurious loan, the rule was clearly upheld. The report of the case does not show that any demand had been made, nor was the objection taken on the trial. The only point left to the jury was whether the goods had been deposited on a contract to pay more than the legal rate of interest for money advanced. The jury found that such was the fact, and the plaintiff had a verdict (*Tregoning v. Attenborough*, 7 Bing. R., 97). And a subsequent case of the same character in the King's Bench was disposed of in the same way, no objection being taken that a demand of the property had not been made (*Hargreaves v. Hutchinson*, 2 Adolph. & Ellis' R., 12). In both these cases the entire value of the goods sold was recovered in trover from the

lender, without any deduction on account of the sum actually loaned and legal interest.

And the same principles were decided in an early case in the present Supreme Court of the State of New York. It appeared that bonds and mortgages against third persons were transferred and delivered to the lender by the borrower, in payment and satisfaction of a usurious debt, or in execution and discharge of a usurious contract; and the court held that no action could be maintained by the borrower to recover the excess of usury alleged to have been paid by him, unless the same was brought within one year after such transfer of securities was made. And it was further held that the right of action in the borrower, under the statute, for the excess of money or property paid by him beyond the sum actually due, is perfect upon the receipt by the lender of bonds and mortgages transferred to him in payment of the debt, and the appropriation thereof to his own use; that the borrower need not wait until the money has been actually received by the lender upon such securities before commencing an action.

Allen, J., in his opinion, among other things, said: "The statute regulating the interest of money (1 *R. S.*, 772, § 3) does not restrict the cases in which a party is entitled to receive the excess paid beyond the legal interest to those in which money, or that which has been taken and received as money, has been paid; but embraces every case where a party has paid or delivered any greater sum or value than is allowed by law to be taken. The form of the action, it is true, may depend upon the medium in which satisfaction has been made. If money has been paid, the action for money paid and received will lie. If property has been delivered, then the vendor's action to recover that property or its value must be resorted to, and in either case the declaration must be under the statute' (*Schroepfel v. Corning*, 10 *Barb. R.*, 576, 580).

This last case was taken to the Court of Appeals of the State, where the judgment of the Supreme Court was affirmed on the ground that more than six years had elapsed since the bonds and mortgages were transferred, and therefore the statute of limitations was a perfect defense to the action. And the following rules were laid down by a majority of the court: Where a borrower, on obtaining a loan of money at an illegal rate of interest, assigns to the lender bonds and mortgages in consideration of such loan, the assignment is void, and trover may be immediately maintained

for them by the mortgagor. The statute of limitations is a bar to such action after six years from the time of such assignment. The same statute is a bar to an action of assumpsit commenced against the lender more than six years after the assignment of the bonds and mortgages to him, to recover moneys received by him thereon within six years prior to the commencement of the action.

Judges Paige and Foot dissented from this view, and held that the receipt of the money upon the mortgages created a new cause of action, which was not barred until six years from the time of its receipt; and Judge Paige was of the opinion that, the assignment of the bonds and mortgages being void, the assignor had a right to treat the assignee as holding them in trust for him, and to claim their proceeds as money paid to his use, and that the assignee could not in answer to such claim set up his own tortious act to prevent a recovery.

Judge Paige also expressed the opinion that the remedy given by statute for the recovery of usurious interest paid to the lender is merely cumulative; that the statute, in providing this remedy, does not take away the common-law remedy of assumpsit for money paid and received. And this position would seem to be in harmony with the principle which governed the majority of the court in the disposition of the case (*Schroeppe v. Corning*, 6 N. Y. R., 107).

The old Supreme Court of the State of New York held, in an early case, that where goods *fraudulently* obtained are deposited with an auctioneer, who makes an advance upon them, and charges five per cent besides the usual commissions, the transaction is *usurious*, and for that cause the auctioneer is not entitled to be considered a *bona fide purchaser*, in an action of trover brought against him by the party from whom the goods were obtained, although he is wholly innocent of the fraud (*Ramsdell v. Morgan*, 16 Wend. R., 574). And in a later case the same learned court held that where notes are delivered on collateral security for the payment of another note upon a usurious agreement, the party depositing the notes may repudiate the agreement under which they were delivered, and bring an action of replevin for their recovery; but that there must be a *demand* before suit.

Nelson, Ch. J., delivered the opinion of the court, and said: "I entertain no doubt that a *demand* was necessary to enable the plaintiff to sustain the suit. The possession of the notes by the

defendant was not unlawful or tortious because they were delivered by the plaintiff himself. As it was lawful for him to deliver the notes, it surely was so for the defendant to receive them. True, the agreement under which they were delivered was not binding, and hence the plaintiff had a right to repudiate it; but this did not render the acts done under the agreement *tortious*" (*Boughton v. Bruce*, 20 *Wend. R.*, 234, 235).

The remarks of the chief justice in this case would seem to countenance the idea that where property has been transferred, to secure a usurious contract, an action will not lie to recover the property until demand and refusal to restore the property, or something amounting to an actual conversion had taken place. But the action of *Boughton v. Bruce* was an action of replevin in the *detinet*, and there may be a distinction between such an action and an action of trover; at all events it is plain, upon authority, that the remarks made in the case cannot be taken as controlling in an action of trover. And especially must this be the rule under the New York statute, which provides that "all deposits of goods or other things whatsoever, upon a usurious consideration, shall be void" (1 *R. S.*, 772, § 5; 1 *Stat. at Large*, 726). The Supreme Court of the United States have decided that where a party distrained property for unpaid rent, under a usurious instrument or lease, the tenant may maintain replevin for the property distrained.

Mr. Justice McLean, in delivering the opinion of the court, said: "If usury may be shown in the inception of a bill, to defeat a recovery by an indorsee, who paid for it a valuable consideration without notice of the usury, may not the same defense be set up where, in a case like the present, the party to the usurious contract claims by virtue of its provisions a summary mode of redress. The court entertain no doubt on this subject" (*Lloyd v. Scott*, 4 *Peters' R.*, 205, 230).

CHAPTER XXXIII.

RELIEF IN EQUITY IN CASES OF USURY — WHEN THE PROCEEDINGS
MAY BE MAINTAINED — GENERAL RULES UPON THE SUBJECT.

IN addition to the remedies which the borrower has against the lender, at *law*, on account of usurious interest and usurious transactions, the common law, and in general the statutes enacted against usury, give the party relief against usury in a court of equity. There are certain rules, however, which prevail in such cases in a court of equity which do not, as a general thing, apply to a proceeding at law. Unless a statute exists to the contrary, the principles upon which a party to a usurious contract can, in a court of equity, obtain relief against the usurious premium are well settled. The invariable rule in equity is, that a bill or other proceeding in equity to set aside or affect a usurious contract, whether filed for relief or discovery, or for both, cannot be maintained without paying or offering to pay the amount actually loaned. Neither discovery nor relief can in any case be obtained in the Court of Chancery, or by proceedings in equity, without a repayment of the sum actually lent, with lawful interest, because the borrower cannot, in any case, or under any circumstances, be *equitably* entitled to keep the money which he has actually received from the lender, and for which the lender has received no consideration. As a general rule, therefore, the borrower is met by that cardinal maxim of a court of equity, "that he who asks for equity must do equity," and can obtain no aid from that jurisdiction in getting rid of or recovering back the amount which has been improperly exacted from him, until he repays the amount which in justice and equity is due from him to the lender. Relief under such circumstances, where the complainant does not ask for or need a *discovery*, is refused exclusively upon this principle; but where he has no legal evidence of the usury, and the object of his bill is to compel the defendant to disclose or admit the fact, he has an additional difficulty to encounter, to wit, that a court of equity will not compel a defendant to answer upon oath, and thus become a witness for his adversary and against himself, when such answer may subject him to a criminal proceeding, or to a penalty or forfeiture, or to any loss in the nature of a forfeiture.

In such a case, therefore, he is bound to waive the forfeiture, and pay the amount actually loaned, not only because it is just and equitable, but in order to guard against the possibility of the defendant's answer being made the means of subjecting him to a forfeiture.

The borrower may have relief in a court of equity against the usurious premium, and may also compel the defendant to disclose the transaction upon oath, in order to prove the usurious contract; but, as a general rule, the relief is granted only upon the principles stated. This is the general rule, although it is sometimes waived by express provision of statute. For example, by the statute of the State of New York it is provided that, whenever any borrower of any money, goods or things in action shall file a bill in chancery for a discovery of the money, goods or things in action, taken or received in violation of the statute against usury, it shall not be necessary for him to pay, or offer to pay, any interest whatever on the sum or thing borrowed; nor shall any court of equity require or compel the payment or deposit of the principal sum, or any part thereof, as a condition of granting relief to the borrower, in any case of a usurious loan forbidden by the statute (1 *R. S.*, 772, § 8; 1 *Stat. at Large*, 726).

As the law stood in New York before the revision of the statutes, every usurious contract, and every instrument, of whatever kind or description, taken as the evidence of such contract, were absolutely void; and when sued upon such contract, all the borrower had to do was to prove such usury, and no recovery could be had against him; he defeated the recovery, not only of the usurious excess, but of the sum actually loaned. If he had legal and sufficient evidence of the usury, his defense was perfect at law, and he had no occasion to invoke the aid of a court of equity. If the knowledge of the usury was confined to himself and the lender, then it became necessary for him to go into a court of equity, and by a bill of discovery to call upon the lender to admit or deny the usury. He was then obliged to waive the forfeiture, by paying, or offering to pay, the sum actually loaned, with interest. And in some cases, where the form of the security was such as to enable the lender to collect it without a suit, either at law or in equity (as a bond and warrant of attorney, or a mortgage), the borrower, although he had competent evidence of the usury, still, as he had no opportunity, from the form of the proceeding, to avail himself

of it at law, was compelled to file his bill, and ask *relief* in equity. In such a case, also, although he sought and required no *discovery*, a court of equity would not relieve him from the usurious excess, except upon the equitable condition of his repaying the sum actually loaned. This was the rule, not by reason of any express statutory provision, but according to the established principles upon which a court of equity always exercised its jurisdiction in granting relief. The Court of Chancery invariably exacted of the party who asked relief against a usurious transaction that he pay, or offer to pay, both principal and interest, as a condition precedent to the compelling of the defendant to answer and make discovery. A bill which did not contain such offer was bad upon its face, and might be demurred to. The power and authority of a court of equity to impose those terms, as the condition of compelling discovery, are not conferred by any statutory enactment. Such authority belongs to the court by virtue of its general equity jurisdiction; and unless a statute exists providing that the party may have relief without the imposition of those terms, the rule will be invariably enforced.

To guard against the possibility of the defendant's answer in a case of usury being made the means of subjecting him to a forfeiture or other punishment, the New York Revised Statutes provide that every person who shall discover and return the money, goods or other thing, taken, accepted or received, or the value thereof, contrary to the usury laws, shall be acquitted and discharged from any other or further forfeiture, penalty or punishment which he may have incurred by taking or receiving the money or thing so discovered and repaid or returned (1 *R. S.*, 772, § 4; 1 *Stat. at Large*, 726). And, as the law was amended by the act of 1837, it is further provided that the testimony given by any plaintiff, or the answer of any defendant, made pursuant to the statute, shall not be used against such person before any grand jury, or on the trial of any indictment against such person (*Laws of 1837, chap.* 430, § 8; 4 *Stat. at Large*, 460). It will be observed that this exemption applies only to the party to the suit; and it has been held that where a person is called as a witness to prove the usury, not a party on the record, if his testimony may be used against him in a criminal prosecution, he cannot be compelled to testify in respect to the usury, until it is shown that he is a party in interest (*The Bank of Salina v. Henry*, 2 *Denio's R.*, 155).

The statute of New York, however, provides a relief for the "*borrower*," and considerable discussion has been had as to who are *borrowers*, within the meaning of the statute. But the late Court of Errors of the State settled the doctrine that the term embraces not only the party to whom the original loan was made, but also his sureties, heirs, devisees and personal representatives. The court held, however, that a subsequent grantee of premises covered by a usurious mortgage is not a "*borrower*," and therefore cannot maintain a suit in equity to set aside the mortgage, without paying or offering to pay the sum actually loaned.

Lott, Senator, in his opinion, said: "The term *borrower* has a well-known and definite meaning. It is used in contradistinction to *lender*, and is intended to designate one of the parties to a contract for a loan, and may be extended to those standing in his place in a representative capacity, as heirs-at-law, executors or administrators; but I think it is a forced construction to treat him as a *borrower* who is entirely disconnected with the loan, and not bound in any way to pay the sum borrowed."

Wright, Senator, closes his opinion in these words: "The result at which I have arrived is, that a grantee of land covered by a usurious mortgage is not a 'borrower' within the fourth section of the act to prevent usury, passed in May, 1837. I think the vice-chancellor of the fifth circuit properly allowed the demurrer to the complainant's bill, for want of an allegation or offer of payment of the money actually due upon the mortgage of Post, and that the decree of the chancellor should therefore be reversed" (*Post v. The President, etc., of the Bank of Utica*, 7 *Hill's R.*, 391, 397, 408).

It was conceded on all sides, in the case in the 7th of Hill, that, according to the law of the Court of Chancery, as it was administered in England and in the State of New York previous to the adoption of the Revised Statutes, the usurer was made secure in the amount of money he actually lent, even in a case where a bill was filed to set aside a security taken for the loan, though the statute laws of both countries had declared expressly that not only the security but the contract for the loan was absolutely void. The complainant was required to pay or offer to pay the sum lent before he could entitle himself to relief or discovery on the ground of usury. This disregard of the plain provisions of the statute was always justified upon the strength of a maxim in that court that

"he who asks for equity must do equity," and hence the court would neither allow a discovery nor grant a relief without a repayment of the sum actually lent, with lawful interest. Such is believed to have been the invariable rule, and such is believed to be the rule at the present time, in the absence of statutory provision to the contrary.

That a purchaser from a borrower is not included in the term borrower within the provision of the act of 1837 of the State of New York, before referred to, has been repeatedly decided by the Court of Appeals of the State. A party occupying that position, therefore, is not entitled to relief as a borrower within the meaning of that provision. Hence, according to the settled principles of equity, he must "do equity" before the court will interfere in his behalf to relieve him from a usurious transaction, to which his grantor was the suffering party (*Vide Reaxford v. Widger*, 2 *N. Y. R.*, 131; *Schermerhorn v. Talman*, 14 *ib.*, 93; *Bullard v. Raynor*, 30 *ib.*, 131; *Chamberlain v. Dempsey*, 36 *ib.*, 144, 149).

The law is well settled that in all cases where a party has not the power to avail himself of the defense of usury at law, he may have relief in a court of equity against the usurious transaction, and he may also take measures in a court of equity to make the lender discover the usury upon his own oath. But in all these cases, where there is no statute to the contrary, the general rule of courts of equity "that he who asks for equity must do equity" applies, and to entitle the borrower to relief he must pay or offer to pay the money actually borrowed. The party in such a case is in the same condition as any other person who seeks the aid of a court of equity to enable him to discover the means of a defeat to a suit at law, and is subject to the general rules that regulate a court of equity in granting relief. It has been truly suggested that the effect of this rule is, that a party making a secret usurious contract has little or nothing to fear; the absence of proof makes him safe at law. And if the debtor resorts to equity, the most he can lose is the usurious excess reserved in the security. And to compensate him for this loss, he is sure to receive back the money actually lent and the legal interest more promptly than he otherwise could collect it. Reasons of this nature, doubtless, have induced the legislatures of some of the States to provide by express statute, that parties seeking relief against usurious transactions shall not be subject to the ordinary maxims of courts of

equity, which require the payment or tender of the money borrowed as a condition of obtaining relief by proceedings in an equity jurisdiction. But without some statutory provision waiving the conditions, the ordinary rule will be enforced, even though statutes may exist allowing parties to testify in their own behalf, or to call their antagonists to give evidence in the case.

Another rule in equity may be stated, which is applicable to a case for relief from usury, as well as others of which a court of equity will take cognizance; and that is, that after a verdict at law a party comes too late with a bill of discovery, unless it is a clear case of accident, surprise or fraud. Said Lord Chancellor Eldon, in an important and well-considered case before the English Court of Chancery: "If a defendant has a good legal defense, but the matter has not been tried at law, it becomes a serious question whether a party, who, being competent, does not choose to defend himself at law, can come into equity and change the jurisdiction. Consider the effect; he might not have succeeded at law, but by coming into equity he secures so much additional time.

* * * Lord Thurlow was very tenacious of the doctrine, that a party who had an opportunity of a trial at law, and would not avail himself of it, could not come here" (*Prothew v. Furman*, 2 *Swanston's R.*, 227). Such now is the established doctrine in England, and has been for a longer time the general doctrine in the American States. And the doctrine, as applied to a case for relief from usury, is, that a defendant sued at law on a contract alleged to be usurious will not be entitled to a bill of discovery if he suffers a nonsuit and judgment to be taken against him, and especially when he does so without making a defense at law; and it has been held, accordingly, that an injunction will not be granted against a judgment where a party seeks a discovery of usury and claims a return of the excess beyond the legal interest. The reason of the rule is, that the proof of usury is a good defense at law; and when it is in the knowledge of the defendant, no satisfactory reason can be given why the discovery was not sought while the suit was pending. Whenever a party making a discovery had knowledge of the facts during the pendency of a suit at law, equity will not permit him to do so afterward to enjoin a judgment. This doctrine is well settled by adjudications in both the State and federal courts, and is uniformly adhered to in cases of alleged usury, as

well as in all others of an equitable nature, where the matter at issue may be made available in a court of law.

Where the plaintiff was held at law on notes alleged by him to be usurious, and suffered a verdict and judgment to be taken against him without making any defense or applying to the Court of Chancery on a bill of discovery in due season, the late Court of Chancery of the State of New York held that he was concluded, and not entitled to relief (*Thompson v. Berry*, 3 *Johns. Ch. R.*, 395). And the same court held, in a subsequent case, that after payment of a judgment recovered against him in a litigated suit at law, the defendant cannot recover the money in equity upon the ground of usury. It was declared that he should interpose that defense at law, and, if necessary, file a bill for discovery; and if the plaintiff is beyond the jurisdiction of the court of law, so that he cannot be examined as a witness under the act of 1837, the defendant may have an injunction staying proceedings until full answer (*Bartholomew v. Yaw*, 9 *Paige's R.*, 165). But it was subsequently held by the same learned court that where the borrower can establish the defense of usury by a competent witness, without a discovery from the real plaintiff, but is so situated that he cannot avail himself of the testimony of the witness in the suit at law, he may resort to Chancery for relief. Where the principal debtor, being discharged under the bankrupt law, in a suit brought against him and his surety, plead his discharge, and issue was taken thereupon by the plaintiff, the court held that the surety could file his bill to set aside the security in suit, and call the principal as a witness (*Morse v. Hovey*, 1 *Barb. Ch. R.*, 404).

The Court of Appeals of the State of Kentucky have held that where usury in the debt sought to be collected was known to the party before the judgment by ordinary proceedings was recorded against him, and was then available as a defense either at law or in equity, and such party fails to rely upon such defense, he is not entitled to relief by injunction against the judgment to the extent of the usury, nor to a modification of the judgment to that extent in a court of equity (*Chinn v. Mitchell*, 2 *Met. R.*, 92).

The same doctrine was recognized in an early case before the Court of Appeals of the State of New York. The complainants were sureties for C. upon a note given to J. for a usurious loan of money. An action at law was brought upon the note against the

complainant, and C., in the name of P., an indorsee. The complainants pleaded the general issue and gave notice of the defense of usury, but did not verify the notice as required by the usury act of 1837, so as to entitle them to examine the plaintiff as a witness. On the trial they called as a witness J., the payee of the note, who stated on his *voir dire* that he was the owner of the note and the plaintiff in interest, and objected to testifying in the cause, and his objection was sustained by the court. A verdict was taken for the amount equitably due on the note, and judgment was perfected against the complainant and C. The court held that a bill filed by the complainants, *after judgment at law*, for the purpose of obtaining the testimony of C., and the ruling against the judgment, on the ground of usury, could not be sustained.

And the court held further, that after judgment at law the bill could not be sustained on the ground that the complainants, as sureties, were discharged by reason of the holder of the note having extended the time of payment to the principal debtor, in consideration of a usurious premium paid by him in advance, it not being shown that the complainants were prevented from setting up this defense in the action at law by any fraud or accident, or by the act of the opposite party (*Vilas v. Jones*, 1 N. Y. R., 274).

The doctrine in respect to the jurisdiction of courts of equity, in cases of usury, underwent examination several years since in the Court of Appeals of the State of New York, and the following points were affirmed: Usury does not, of itself, constitute a ground of jurisdiction in a court of equity, and the act of the legislature of the State, passed in 1837 to prevent usury, does not enlarge the powers of courts of equity in this respect. Where an action at law was commenced to recover upon a contract alleged to be usurious, and the defendant in the action filed a bill in chancery praying for an injunction to restrain the proceedings, but alleging no defect in the means of establishing his defense at law, the court held that the bill could not be sustained.

Harris, J., delivered the opinion of the court, and said: "The most general description of a court of equity is, that it is a court having jurisdiction in cases where a plain, adequate and complete remedy cannot be had, at law. There are exceptions and limitations to this general proposition, but none, I think, which can give such a court jurisdiction of this case. The plaintiff filed his bill to arrest a trial at law, and transfer the litigation to the Court of

Chancery. He asks for no discovery, and alleges no defect in the means of establishing his defense at law. The defendants, in their answer, object to the jurisdiction of the court on the ground that the remedy at law is perfect. The objection was in time, and unless there is something in the grounds upon which the plaintiff has sought the interposition of a court of equity, which gives it concurrent jurisdiction with a court of law, the objection must prevail.

"Assuming that the transactions between the parties are correctly stated by the plaintiff, and that they make out a case of usury, yet before he can transfer the litigation from the court of law in which it had been commenced to a court of equity, it must appear that he will be deprived of some legal or equitable right if the action at law is suffered to proceed. The mere allegation of usury has never been regarded as a ground of equity jurisdiction. No instance can be found in which a court of equity has interfered upon that ground alone.

"It seems to have been supposed by the plaintiff's counsel that the statute of 1837 (*Sess. L.*, 1837, p. 486, §§ 4, 5) enlarged the jurisdiction of the Court of Chancery so as to embrace such a case. But such has never been the construction of that statute. * * * The object of the act of 1837, undoubtedly, was to enable a borrower, where for any reason he found himself unable to make his defense at law, and was thereupon obliged to resort to a court of equity for discovery or relief, to do so without the former prerequisite of paying or tendering the sum actually borrowed. The act did not enlarge the class of cases in which a bill in chancery might be filed, but merely changed the terms upon which the borrower might obtain relief in that court. * * * There is nothing in the act which indicates an intention to extend the jurisdiction of the Court of Chancery beyond the cases which were before cognizable in that court" (*Minturn v. The Farmers' Loan and Trust Company*, 3 *N. Y. R.*, 498, 500).

The late Court of Chancery of the State had previously held that the Court of Chancery was not compelled by the act of 1837 to take jurisdiction of every case of usury, and decided that it would not entertain jurisdiction where both discovery and relief could be had at law; as where the security was a note negotiable, and the payee was within the jurisdiction of the court of law, so that he could be called as a witness under the act (*Perrine v. Stry-*

ker, 7 Paige's R., 598). And in a later case the same court held that the act of 1837 did not confer upon the Court of Chancery concurrent jurisdiction with courts of law in all cases of usury, but merely gave that court power to exercise its jurisdiction in those cases where it is necessary to aid the defense of usury, or to remove usurious securities which are a cloud upon the complainant's title to real property, or which may be used at law to his injury, or in such manner that he cannot interpose a legal defense to them in a court of law (*Morse v. Hovey*, 9 Paige's R., 197).

But in a still later case, the same court held that where a mortgage is usurious, and a cloud upon the title of the mortgagor, he has a right under the act of 1837 to come into the Court of Chancery for the purpose of having it canceled; although it was decided that he was not entitled to an injunction to prevent the mortgagee from trying the question of usury at law, unless a discovery was necessary, or some other obstacle existed to making the defense at law (*Hartshorn v. Davenport*, 2 Barb. Ch. R., 77).

The same court, in a case before the vice-chancellor of the first circuit of the State of New York, decided that though usury may be proven at law and a legal suit is pending for the loan, the court will take jurisdiction where the borrower seeks not only to have the contract declared null and the suit enjoined, but also the surrender to him of valid collateral securities (*Peters v. Mortimer*, 4 Edw. Ch. R., 279). Reverting again to the familiar doctrine in courts of equity; that "he who seeks equity must do equity," reference may be made to a late case involving that question, decided by the New York Court of Appeals, in which it was determined that where a contract or obligation is given for two or more separate and independent things having no connection with each other, and one of those objects is the security of a usurious debt, although the contract is void altogether, under the New York statute against usury, and no action at law or in equity could be maintained thereon, nevertheless, if the party comes into a court of equity to ask that such contract be surrendered, all the statutes of usury have done affecting the complainant's right to relief is to forbid that any payment on account of such usurious debt shall be made a condition of relief. It was further held and declared that, where a mortgage has been given upon lands in Ohio to secure the payment of several promissory notes, a part of which notes are usurious, and a part of which are *bona fide*.

although the mortgage is void, a court of equity will require the complainant to do equity by paying or tendering payment of the valid notes covered by the mortgage, before it will entertain a suit to cause the mortgage to be delivered up to be canceled, as a cloud upon title. This is substantially the syllabus, or points decided by the case; but the importance of the question discussed in the able opinion of the court seems to justify some liberal extracts from the opinion.

Woodruff, J., who delivered the opinion of the court, said: "Bills by borrowers to remove usurious securities, which are a cloud upon the complainant's title to real property, have uniformly been entertained. * * * It is no answer to such a bill that the mortgagor has a good defense to a bill for the foreclosure of the mortgage. It is an apparent encumbrance on the land. Its invalidity depends upon extrinsic facts. * * * The mortgage is an impediment to a sale of the land for its value. The mortgagor is not bound to wait until the mortgagee attempts a foreclosure, not only for these reasons, but because, in the meantime, it may become impossible to prove his defense. * * * The mere circumstance that the land is in another State can, upon no principle that I can discover, furnish a reason for denying the jurisdiction of our courts, or for questioning the propriety of its exercise. * * * It follows, that where a contract or obligation is given for two or more separate and independent things or objects, having no connection with each other, and one of those objects is the security of a usurious debt, although the contract or obligation is altogether void for reasons above given, and no action at law or elsewhere could be maintained thereon, nevertheless, if the party comes into a court of equity to ask that it be surrendered, all that the statutes of usury have done affecting the complainant's right to relief is to forbid that any payment, on account of such debt, shall be made a condition of relief. As to other conditions the statute is silent, and the court is left to administer relief upon those principles which govern the subject generally.

"Where, therefore, the plaintiff asks that a mortgage be canceled as a cloud upon the title to his lands, and that a court of equity shall so direct, in virtue of its power and its disposition to enforce his equitable rights, the court may not require that he pay a usurious debt, or any part thereof, or any interest thereon, but it may

require the performance of any other duty which is just to the adverse party, unembarrassed by the statutes in question.

"In equity, the mortgagor in such case stands, in reference to debts not usurious secured by the mortgage, in the same attitude as a complainant seeking to redeem. He must pay what at law and in equity he owes. Nor is this any departure from the doctrine already stated, that the mortgage, being void in part, because given to secure a usurious debt, is void altogether.

"Upon that doctrine the plaintiff, if he sees fit, may rely; and on that ground he may, if he can, defend himself and the title to his lands, wherever and whenever assailed. But if he asks affirmative action and interference from a court of equity to set aside the mortgage and adjudge its surrender, he must do equity by paying his just debt, not impeached for usury" (*Williams v. Fitzhugh*, 37 *N. Y. R.*, 444, 448, 449, 455, 456).

And the Supreme Court of New York, in a well considered case decided so late as November, 1871, laid down the doctrine that the usury act of the State, passed in 1837, was not designed to require a court of equity to entertain a suit which, according to its settled practice, it would not have entertained before that act, but only to relieve a borrower, under a usurious contract, from the obligation to repay the money actually borrowed in cases where a resort to a court of equity was necessary, either for discovery or relief. It was declared that the former rule of courts of equity, requiring a complainant who sought relief in that court against a usurious contract, obligation or security, to repay the money actually loaned, with interest, as a condition of granting the relief, was abrogated by the statute of 1837 only in behalf of the borrower; that the rule is not abrogated as to the grantee of the borrower. Where such grantee, as such, commences a suit for relief, the rule requiring him to do equity, as a condition of relief, is held still to apply.

But the court further held that if there is no offer by such grantee, before suit or in his complaint, to do equity, according to the practice of the court, the omission to make such offer now goes only to the question of costs. If the defendant, to recover his equitable rights, has been compelled to defend the suit and to appeal, the court declared that he is entitled to his costs. Other important questions were considered in the case, but no others upon this particular point (*Bissell v. Kellogg*, 60 *Barb. R.*, 617).

The English courts held, while their statutes of usury were in force, that a mortgagor impeaching a security for usury could only be relieved on payment of what was justly due; and if the contract was that he should pay what was due on a banking account, that he must, according to this rule, pay what was due, according to the account as usually kept between banker and customer (*Turnough v. Cooper*, 31 *Eng. Law and Eq. R.*, 526).

Under the statutes of Wisconsin against usury, it has been held that a bill which sets up a usurious contract is not defective for want of equity, even though it does not contain an offer to pay the sum equitably due; that is to say, such was declared to be the rule in that State in 1857, which is substantially the same as under the statutes of the State of New York (*Cooper v. Tappan*, 4 *Wis. R.*, 362).

A different rule prevails in the State of Arkansas. The courts of that State have held that although the statute makes all bonds, notes, conveyances, etc., void when taken on a usurious consideration, yet, if the debtor comes into a court of chancery to set aside such bonds, etc., on account of usury, he must, before he shall be entitled to relief, whether the usury shall be established by answer or other proof, pay or offer to pay the principal actually borrowed or advanced to him, with legal interest, or that the court will, on demurrer, dismiss his bill; but, if the defendant answer the bill generally, that the court will proceed to render such decree as may be consistent with equity and good conscience (*Ruddell v. Ambler*, 18 *Ark. R.*, 369).

And, substantially, the same rule prevails in the State of Alabama. It has been there held that, in a suit in equity to obtain relief against usurious interest, the relief will be granted only on payment of principal and lawful interest (*Noble v. Walker*, 32 *Ala. R.*, 456).

And in an early case before the same court it was held that where a debtor comes into equity for relief against a judgment at law or other legal security, on the ground of usury, when he has, by his own voluntary act, deprived himself of the opportunity to appear and plead the usury in the character of defendant, he is required to pay principal and legal interest. But it was declared that this rule does not apply, in the absence of such voluntary act, where the heirs of the mortgagor came into equity to redeem the mortgaged premises, to set aside a decree of foreclosure which

was obtained by the creditor in a suit so conducted as to deprive them of the opportunity to appear and plead the usury, and to remove the cloud on their title created by the proceedings in the foreclosure suit. It appears, however, that Walker, J., dissented from the judgment of the court (*Hunt v. Acre*, 28 Ala. R., 580).

The Court of Chancery of New Jersey holds that a party seeking relief in equity against a usurious contract must offer to pay the sum actually due, thus recognizing the ordinary rule in equity, where there is no statute modifying the rule (*Ware v. Thompson*, 2 Beasley's R., 66; and *vide Giveans v. McMurtry*, 1 Green's R., 468; *Herdit v. Nast*, *Id.*, 550).

The Supreme Court of Ohio holds that the doctrine, that a party seeking affirmative relief in a court of equity against a usurious contract, either by way of original or cross-petition, must first do equity by tendering the amount due, exclusive of the usury, does not apply to a defendant acting strictly on the defensive (*Union Bank v. Bell*, 14 Ohio N. S. R., 200). And the Supreme Court of Iowa has held to the same doctrine, deciding that a defendant in proceedings to foreclose a mortgage may set up the defense of usury without first tendering to the plaintiff the amount admitted to be due (*Kuhner v. Butler*, 11 Iowa R., 364).

The Supreme Court of the United States have held that the general doctrine of equity, that a party complaining of usury can have relief only for the excess above lawful interest, applies to the case of a person standing in the position of a claimant, through bill in equity of priority in a fund, another claimant upon which, as defendant, is the alleged usurer; and the fact that the suit is a mere contest between different parties for a fund, and a contest, therefore, in which each claimant may, in some sense, be considered an actor, does not force the alleged usurer into the position of complainant or plaintiff, and so expose him to the penalty incurred by a person seeking as plaintiff to recover a usurious debt; that is, expose him to the loss of the entire claim (*Spain v. Hamilton*, 1 Wall. R., 604).

It has been held by the Supreme Court of the State of Illinois that if the maker of a promissory note has been compelled to pay it to a *bona fide* indorsee, to whom it has been indorsed before maturity and without notice, such payment will be regarded as compulsory; and the maker, in a suit in equity against the payee and the indorser, may, under the general prayer for relief, recover

of the payee the usurious portion of the note (*Wordworth v. Huntington*, 48 Ill. R., 131). And the same court held, at an earlier date, that although after a transaction has been closed, usurious interest cannot be recovered back, yet, while the transaction is still open and the debt unpaid, a Court of Chancery, in stating the amount, will allow as a credit upon the principal whatever usurious interest may have been paid (*Parmelee v. Lawrence*, 44 Ill. R., 405).

Such are the general rules under which a party may have relief in a court of equity against a usurious transaction. A court of equity is bound by the statutes of usury; and although upon the complaint of the borrower aid will be extended to him upon the terms of his paying the sum lent, with lawful interest, as a general rule., so the rule is equally general and uniform that the lender can have no relief whatever, and his bill to enforce a usurious contract will invariably be dismissed, except in those cases where the matter is regulated by statute. A contract tainted with usury is denounced as corrupt, and every court must treat it as holding the character which the legislature has stamped upon it. Accordingly, a court of equity cannot be invoked to aid such a contract in whole or in part, or grant the usurer any affirmative relief. And at the same time, the just and equitable maxim, that a plaintiff, to entitle himself to equity must do equity, is uniformly applied to cases of usury, except in those cases where the rule is abrogated by statute. Where the borrower is sued, if he can prove the usury, the lender must fail; but if the borrower cannot succeed without calling upon the court for the exercise of its equitable powers, the court invariably refuses its aid unless those who ask for equity are willing to do equity themselves. While the court will protect the borrower, they are careful to observe that, where he seeks relief, he does not himself become the oppressor. Before he can appeal to their equitable jurisdiction, he must prove himself worthy their protection by performing all that equity requires at his hands; and, therefore, he cannot demand their assistance against his creditor till he has first been in the same situation as he stood before the bargain, by returning the principal really borrowed, together with lawful interest.

CHAPTER XXXIV.

THE PRACTICE IN CASES OF USURY — PLEADINGS IN SUCH CASES,
BOTH IN LAW AND EQUITY — AMENDMENTS OF THE PLEADINGS IN
THESE CASES.

THE practice of the courts in cases of usury is, in some respects, peculiar; and it becomes necessary, therefore, to refer to the principles which are applied to these cases, which distinguish them from ordinary suits. The action is prosecuted and defended by the same process in these as in other cases; but, for reasons satisfactory to the courts, the principles which are recognized in ordinary cases, both as to pleadings and practice, are sometimes ignored in these. These peculiarities are doubtless due to the fact that the courts look upon the effort to take advantage of the statutes of usury as hard and unconscionable, and, consequently, are more stringent in their rules in respect to usury cases than in most other legal proceedings. In this regard, the statute against usury, and the statute of limitations, are usually considered in the same category. Neither of these statutes are usually regarded by the courts with the utmost favor. Forfeitures and penalties on account of usury are always prescribed by statute; and the manner of prosecuting for them, and the time within which the action for the recovery of them must be instituted, are also invariably prescribed by the statute which imposes them. It is obvious, therefore, that it is material to consider when the consummation of the offense takes place, so as to charge the usurer, and bring the action within the proper time.

According to the very earliest cases in England, the very making of the usurious contract subjected the lender to the penalties of the statutes, although he never received a single farthing; and in an occasional State in this country, at the present time, the same rule is enacted by statute. But the rule laid down in the earlier cases is now nowhere recognized, unless enacted by statute. It was, however, declared in one of the first cases which questioned this rule, that if one contracted to have twenty pounds upon the loan of £100, and he took nothing of the twenty pounds, he should not be punishable by the statute; but if he took anything, if but one shilling, this was an affirmance of the contract, and made him

liable for the whole (*Mallory v. Bird*, cited in *Cro. Eliz.*, 20). But the rigor of this doctrine was considerably softened by an interpolation of Mr. Justice Ashton, that by one shilling was meant one shilling beyond the legal interest (*Fisher v. Beesley*, *Doug. R.*, 226; and *vide Brown v. Fulsbye*, 4 *Leon. R.*, 43).

All of the later English authorities are to the effect that when a premium is paid for the loan, which, coupled with the interest, exceeds the legal rate, the action does not accrue till the interest is received. And though the usury is complete as soon as the lender has received the interest in money or money's worth, yet the mere taking of a promissory note for the payment of the sum lent, with usurious interest, does not complete the usury, unless the bill be paid; for until it be paid, the lender has received nothing. If money was lent by a check, the same rule would apply; the usury would not be complete until the check was cashed. The difference of the effect of the statute in the avoiding of the contract on account of usury, and the accruing of the penalty or forfeiture, is therefore manifest. As soon as a usurious contract is made, it is, *ipso facto*, *ab initio* void, unless a different effect is given to the transaction by statute. But the penalty or forfeiture does not arise upon the making of the contract. That is only incurred by the execution of the contract, or by the receipt of excessive interest without any previous usurious agreement. The English authorities to this effect are numerous and conclusive, and the American authorities are quite uniform in holding the same doctrine. It is obvious, therefore, that the time limited by the statute in which the action may be commenced on account of usury begins to run at the time the excessive interest is paid, and not at the time it is contracted.

The action for the recovery of the penalty or forfeiture under the English statute of usury was a local action by the express words of the statute, and had to be brought in the county where the offense was committed. As a general rule, all actions brought to recover a penalty given by statute in the American States must be brought in the county where the cause of action accrued, although the question of venue is invariably regulated by statute.

The process by which an action is commenced, and the defendant brought into court, in a case arising under the usury laws, is precisely the same as in other cases of a similar nature, and prosecuted in the same court. The borrower of the money is as capable of suing for the penalties given by the statutes of usury as a stranger;

although it has been held that previously to the commencement of the action he must repay, or at least tender, all the money borrowed; but this is not now generally the rule. *It has been decided that in commencing the action it is no variance or irregularity if the plaintiff sues out the writ in his own name, and afterward declares *qui tam*; for by this his demand is rather narrowed than enlarged. This was so held by the English courts; but the question is one of practice, and the rule might not be regarded as uniform in the American States, where the action *qui tam* may be brought.

In framing the declaration in an action on the English statute of usury, several things were declared to be material to the validity of the pleadings, and any misstatement of which would prevent the plaintiff's recovering; and the same things may be pertinently considered in this country. These were:

1. The *time* of the contract or loan.
2. The *animus quo* of the person forbearing.
3. The person to whom the debt was forborne.
4. The substance of the contract and forbearing.
5. The taking of the excess of interest.
6. The formal conclusion.

These requisites of the declaration under the old English statute were stated in their order by Mr. Comyn, over fifty years ago, and they are generally adhered to in similar cases at the present day. They will be considered in the order in which they are given:

1. The time of the contract or lending must be stated in the declaration or complaint to be subsequent to the passage of the statute, but if this appears by the terms of the contract or instrument itself, it is sufficient without a formal allegation.

The day of the loan must be accurately stated, and a substantial variance will be fatal to a recovery. The old English authorities are very strict in this particular. Thus, for example, where the corrupt agreement was stated to have been on the 26th of March, 1801, and it appeared that the money was not advanced until the 27th of the month, the plaintiff was nonsuited on account of the variance (*Carlisle, qui tam, v. Trears, Cowp. R.*, 671). And where the loan was stated to be on the 21st of April; and in proof it appeared that on that day the borrower received from the defendant, as part of the sum lent, a check which was void for

want of a stamp; and that on the same day he paid this into his bankers, who immediately gave him credit for the amount, but that the banker did not receive payment of it until the next day, Lord Ellenborough, C. J., considering the check a nullity, thought that there was no lending until the 22d April, when the money was absolutely received. And, therefore, his lordship nonsuited the plaintiff (*Borrodaile, qui tam, v. Middleton, 2 Camp. R.*, 53). Other cases of similar import on the point are referred to by Mr. Comyn, but they need not be considered here. The two cases cited are sufficient to illustrate the rule.

On the contrary, the English Court of King's Bench sustained the declaration in the following case: Goulton owed Flintoft £600 on bond, and Flintoft was indebted to Wilson, the defendant, in £1,200 on a promissory note. Flintoft being unable to pay the defendant more than half of his debt, on account of the default of Goulton, it was agreed between the respective parties, on the 4th of April, 1798, that the defendant should accept Goulton and one Yates, by way of surety for him, as defendant debtors, for the remaining £600 instead of Flintoft; the defendant saying, however, that he would only lend Goulton the money for one year, which was agreed to. Accordingly, Goulton and Yates gave their promissory note of that date, by which they jointly and severally promised to pay to the defendant or order £600 on demand for value received, with interest after the rate of £5 *per cent per annum*; and the defendant at the same time received from Goulton a premium of ten guineas. Flintoft, however, having omitted to bring Goulton's bond with him, it was agreed that the old securities should be the next day delivered and canceled, which was accordingly done. The declaration laid it as a loan of money from the defendant to Goulton on the 4th of April, 1798.

It was objected that there was no loan of money, none having been received by Goulton; and that making himself the debtor instead of Flintoft, and giving his own note for the money, did not constitute a *loan*, though it might have been laid as a corrupt contract; or if it did constitute a loan, it was not such to Goulton alone, but to him and Yates jointly. It was also objected that the loan was improperly stated to be on the 4th of April; for that the agreement did not take effect until the bond given by Goulton to

Flintoft was canceled. The court overruled all the objections, and held the transaction to be rightly described.

Lord Kenyon, C. J., said: "There is no weight in any of the objections. This was in substance a loan of money from the defendant to Goulton, although the ceremony of handing the money over from the one to the other did not take place. But the loan originally advanced to Flintoft was by agreement transferred to Goulton. This transaction took place on the 4th of April, when the note was given, and on that day it was agreed that the old securities should be given up, though it was not actually done till the next day, the parties not having them ready at the place. The objection proceeds upon an assumption of fact not well founded."

Grose, J., declared himself of the same opinion.

Lawrence and Le Blanc, JJ., both delivered opinions resulting in the same conclusion as Lord Kenyon (*Wade, qui tam, v. Wilson, 1 East's R., 195*).

2. In respect to the *animus quo* of the person forbearing, it is well settled that a mere mistake will not make the lender liable as for usury. It is obvious, therefore, that in order to charge him, it must be expressly stated in the declaration or complaint that the taking of excessive interest was by a corrupt agreement, and so hold the authorities.

3. It is also necessary to state in the pleading with precision the person to whom the forbearance was given. Where the contract was laid in an information for usury to be with *persons unknown*, the court held the pleading defective (*Nasie's Case, Noy's R., 143*). Although it appears that though it be not specially averred that the forbearance was to A., if it appears to have been so with certainty from the whole pleading, it will be sufficient (*Marshall v. Birkenshaw, 4 Bos. & Pul. R., 172*).

And it has been held that if more than legal interest be taken by the defendant, on a note given to A. by B. as a collateral security for money lent to C. and indorsed by A. to the defendant, such usury is well described to be for the forbearance of money lent by the defendant to B. (*Manners, qui tam, v. Postan, 3 Bos. & Pul. R., 343*).

So, also, it has been held that if a person discounts a bill of exchange and pays for it the amount of the contents, deducting only legal interest, and on a subsequent day receives usurious interest under pretense of guaranteeing the acceptor, the sum first

paid may be laid as forborne to the person who first received the money on indorsing it to the discountor, even supposing that that person if sued on the bill might recover over against the discountor as guarantor (*Lee, qui tam, v. Cass*, 1 *Taunt. R.*, 511).

4. In setting out the contract in the pleading, it is sufficient to describe the corrupt bargain generally, because matters of this kind are supposed to be privily transacted, and the action or information may be brought by a stranger, who cannot have the same means of knowledge as the parties themselves. The authorities, and especially the old authorities, generally hold that there are three points, however, upon which strict accuracy is requisite, because the judgment depends upon them. These are the sum forborne, the *time* for which it is forborne, and the excess of interest taken.

In an early case before the English Court of Common Pleas, the action was brought for the penalty under the statute of usury, and the declaration stated a specific sum of money to have been lent (in which the usury consisted), but the evidence on the trial showed that the loan was part in money and the rest in goods of a known value, to wit, old gold, among which was an old tooth-pick case, taken as cash at a specified price, by the party receiving the loan. An objection was taken to the evidence that it was variant from the declaration; but Lord Loughborough held that the contract was proved as laid, because it was not originally a contract for the delivery of goods, but for the loan of money. The contract was for the loan of money; and it was only in the execution of the contract that a particular commodity was made to stand in the place of the thing which constituted the value. A verdict was taken for the plaintiff, and a rule was obtained to show cause why the verdict should not be set aside and a new trial granted, on the ground that there was a variance. But the court in banc unanimously sustained the ruling at the trial, and discharged the rule.

Loughborough, C. J., in his opinion, said: "I lay no stress on the commodity being gold. I think if any other commodity of less easy sale had been so estimated, the case would have been precisely the same."

Heath, J., said: "I am of the same opinion. The declaration seems to me to be well framed and sufficiently proved. It would make a great difference if the delivery of the goods were to be a part of the shift and no part of the original contract. I do not see

two contracts, as it was said; there appears to me to be but one; and a piece of bullion was substituted as coin."

Wilson, J., said: "I am of the same opinion. There is no doubt but that if the goods had been part of the cover or shift, it should have been stated; as that would have been in the description of the offense" (*Barbe, qui tam*, v. *Parker*, 1 H. Bl. R., 283, 288, 289).

It has been held that the time of forbearance must be stated with accuracy, as well as the time of the loan. And it has been said in some cases that where there is a loan for twelve months, this shall be intended of calendar, and not lunar months (*Sir Wollaston Dixie's Case*, 1 Leon. R., 96). In legal proceedings, however, the Court of King's Bench held that a *month* means *four* weeks; though it was said that six months are understood to be six calendar months, or half of a year (*Tullet v. Linfield*, 3 Burr. R., 1455).

The *excess* of interest must also be correctly set out; to show that more than legal interest was taken will not suffice, unless the exact amount be stated. At least, such was the old rule; and there does not seem to have been any departure from it, except where the practice of the courts has been liberalized by statute (*Martin Van Harbuck's Case*, 2 Leon. R., 39, pl. 52).

In the State of North Carolina it was held, so late as 1855, that in a *qui tam* action for usury the declaration must state precisely and accurately the sum lent and forbearance, the time of forbearance, and the excess of interest.

Battle, J., said: "In a *qui tam* action for usury the declaration must state precisely and accurately the sum lent and forborne, the time of forbearance and the excess of interest, because these three points are indispensable to enable the court to see on the record that the interest received, according to the sum lent and the time, was at a rate forbidden by law, and the proofs must sustain the allegations as laid" (*Taylor v. Cobb*, 3 Jones' L. R., 138, 140).

And in 1845 the same court held a similar doctrine to the fullest extent in a case *qui tam* for usury, wherein the declaration was that the defendant had corruptly taken, on the 20th of April, 1844, twenty-five dollars usurious interest on a contract for the forbearance of \$175, from the 21st of April, 1843, to the said 20th of April, 1844; and the proof was that the usurious interest was

taken for the forbearance of \$175 from the 21st of April, 1843, to the 21st of April, 1844. The court held that there was a fatal variance, though it was but for one day.

Ruffin, C. J., delivered the opinion of the court, and said: "The court agrees with his honor that according to the contract as appearing on paper, there is a substantial variance from that stated in the declaration, although it be not requisite in a declaration, as it is in a plea, to describe the usurious contract specially, but it may be done generally, inasmuch as the action is given to a stranger who may not be able to ascertain all the particulars (1 *Saund.*, 295, *note*); yet the precedents and authority show that the declaration must be precise and accurate in the statements of the sum lent and forborne, the time of forbearance, and the excess of interest, because these three points are indispensable to enable the court to see on the record that the interest received according to the sum lent and the time was at the rate forbidden by law; and the proofs must sustain the allegations as laid. And these points must be stated according to the facts; for, as Lord Kenyon said, in *Rex v. Gillham* (6 *T. R.*, 265), they must be found as laid" . . . (*Allen v. Ferguson*, 6 *Ired. R.*, 17, 20).

The declaration or complaint must state that the corrupt agreement was followed up by a loan and the actual receipt of excessive interest. This requisite of the pleading would seem almost as a matter of course; but it has been expressly declared by the courts (*Vide Rex v. Upton, Strange's R.*, 816).

The old authorities required that the declaration in an action to recover the penalty or forfeiture imposed by the statutes of usury should end with the formal averment, *contra formam statute*, though it was held not to be necessary to aver the particular statute (*Toptclif, qui tam, v. Waller, Dyer's R.*, 346; *S. C.*, 1 *And. R.*, 48, *pl.* 122). It is improper to state any damage in a declaration *qui tam*, because, until the informer's commencing the action, no interest attaches to him, and the debt only arises upon the judgment. At least, this has frequently been held in analogous cases brought to recover penalties imposed by statutes (*Vide Frederick v. Lookup, qui tam, in error, 4 Burr. R.*, 2018; *Corning v. Sibby, Ib.*, 2489).

In some States, as in the State of New York, the statute provides that the borrower may bring the action to recover the excess of interest paid by him within a specified time, after which the

action is given to an informer, overseer of the poor, or the like. In such case, in an action *qui tam*, the declaration must state that the party aggrieved neglected to sue within the time prescribed (*Vide Morrel v. Fuller*, 7 Johns. R., 402).

A complaint to recover usurious interest alleged a loan in July, 1855, for which a note was given; and several renewals of the note, at each of which sums exceeding the legal rate of interest were "required" under pretext of exchange, and then averred that all the sums thus required were paid in December 1, 1857. The action was commenced in November, 1858, and there was a demurrer. The Supreme Court of Wisconsin held that a judgment of usury within one year was sufficiently alleged (*Durkee v. City Bank*, 13 Wis. R., 216).

The requisites of a complaint in equity for relief in cases of usury are not essentially different from those of a complaint in other cases of an equitable nature. It has been heretofore shown in what cases a court of equity will grant relief in a usurious transaction, and the terms and conditions on which the relief will be granted. It is only needful that care should be taken to set up fully and accurately in the complaint the facts of the case, and that all the terms and conditions for relief have been complied with, on the part of the complainant, bearing in mind always that the courts are more rigid and technical in their practice in cases of usury than in ordinary cases of equity jurisdiction.

In respect to the answer or plea, where the party seeks to avail himself of usury as a defense, most of the suggestions which have been made in regard to the declaration or complaint, in cases of usury, will apply here, with the additional remark that courts are even more exacting of the pleader, when usury is set up as a defense to an action, than when it is laid as a foundation for affirmative relief.

As a general rule, it may be affirmed that the defendant cannot avail himself of the defense of usury in a contract or other instrument, under a general answer denying the plaintiff's right, as claimed in his declaration or complaint. He must, in his answer or plea, both at law and in equity, set up the usury specifically, stating distinctly and correctly the terms of the usurious agreement and the amount of the usurious premium. The practice will be better understood and illustrated by a brief reference to some of the leading cases upon the point.

The late Court of Chancery of the State of New York decided that the courts cannot take notice of the usury laws of sister States, but that they must be proven; and the court held that, where an answer sets up usury in violation of the laws of another State, it must state what those laws were at the time of the sale of certain bonds alleged to be usurious, as well as the facts and circumstances of the transaction (*Hosford v. Nichols*, 1 *Paige's R.*, 220; *Curtis v. Martin*, 11 *ib.*, 15; and *vide Outler v. Wright*, 22 *N. Y. R.*, 472). The same Court of Chancery held that in a suit, either in equity or at law, founded on a specialty, the terms of the usurious agreement, and the amount of the usurious premium, must be set out distinctly and correctly in the answer or plea, and the proof must sustain these statements; and that if the contract proved is materially different from that alleged in the answer or plea, the defendant must fail, even though the contract proved is usurious (*New Orleans Gas-light and Banking Co. v. Dudley*, 8 *Paige's R.*, 457; *Vroom v. Ditmas*, 4 *ib.*, 526). And the same court, before the assistant vice-chancellor of the first circuit, declared that a general allegation of usury was unavailing. The averment was that a fictitious item of \$112 was included in a settlement, and inserted as a part of the consideration of a bond and mortgage given thereon by way of usury; and the defendant proved that the complainant said he had taken usury, or that there was usury in the mortgage; that the mortgagors paid him more than seven per cent, and that he mentioned at sundry times various rates of usurious interest. The court held that the evidence did not support the averment, and that as none of the rates mentioned would produce the item of \$112, it would not support it, even if the proof were that usury at some of these rates was included in the bond and mortgage (*Rowe v. Phillips*, 2 *Sand. Ch. R.*, 14). And the same assistant vice-chancellor held that proof of usury is inadmissible, unless the answer avers that there was a loan or that the transaction was a cover for a loan (*Holford v. Blatchford*, 2 *Sand. Ch. R.*, 149).

In a late case before the Supreme Court of the State of New York, the question of the sufficiency of an answer of usury was examined. The action was upon certain drafts discounted by the plaintiff for the defendant. The defense was usury. The answer alleged that the plaintiff discounted the drafts at a usurious rate of interest, contrary to the statute in such case made and provided,

taking from the defendant the sum of fifteen dollars for the time they had to run, though it did not in express terms state that the agreement was intentionally usurious. The plaintiff moved for judgment on account of the frivolousness of the answer. The court at Special Term denied the motion, and the plaintiff appealed. The order was affirmed, but the court declared the doctrine that where usury is set up as a defense the usurious contract should be so pleaded as that it may appear what rate or amount of interest was taken or received, and on what sum, and for what time, and that the answer should show a corrupt intent.

Clerke, J., in his opinion, said: "In the answer before us it is expressly stated that the plaintiffs, in discounting the drafts, took the sum of fifteen dollars for the time which they had to run, thus averring what the usurious agreement was, between whom it was made, and the *quantum* of usurious interest that was agreed upon and received. It does not, indeed, in express terms, state that the agreement was intentionally usurious and corrupt; but I think this must be necessarily inferred. At all events, the answer avers that the plaintiffs discounted the drafts at a usurious rate of interest, contrary to the statute in such case made and provided, and then specifies the amount of interest taken. This may or may not be an insufficient averment of a corrupt interest, but it is not so palpably defective in this respect as to authorize a judgment for frivolousness."

Ingraham, J., remarked: "If usury is set up as a defense, but defectively, the answer is not frivolous, though it may be bad on demurrer" (*The National Bank of the Metropolis v. Orcutt*, 48 *Barb. R.*, 256-258).

In the State of New Hampshire, the Supreme Court holds that a plea of usury concluding with a verification is good, but perhaps there is nothing in this doctrine that is peculiar to a pleading in a case of usury (*Gunnison v. Gregg*, 20 *N. H. R.*, 100).

Under the usury act of 1845, in the State of Maryland, held not repealed by the new Constitution of the State, it has been decided that usury must be specially set up as a defense or the court will not notice it; and such is the rule at the present time in that State, as it is in most of the States where usury laws exist (*Bandel v. Isaac*, 13 *Md. R.*, 302).

In the State of Indiana, it has been held that in a suit on a promissory note a defense seeking to annul the entire contract for

usury, without showing what amount of illegal interest it includes, is bad (*Collins v. Makepeace*, 13 *Ind. R.*, 448). And in the State of Illinois, it has been held that a plea of usury, professing to answer the whole count of the declaration, while it only answers so much of it as claims to recover more than legal interest, is bad on demurrer (*Nichols v. Stewart*, 21 *Ill. R.*, 106).

While usury could be pleaded in Massachusetts, it was held that an answer by an indorser to an action on a promissory note does not sufficiently aver usury by averring that the "plaintiff reserved a greater rate of interest than is allowed by law, at the time of discounting said note for the defendant, to wit," a certain sum (*Clarke v. Hastings*, 9 *Gray's R.*, 64).

In the State of Arkansas, it has recently been held that, in pleading usury, the intention to take or reserve more than legal rate of interest must be averred (*Moody v. Hawkins*, 25 *Ark. R.*, 191). An answer under the usury laws averred that the payee "had reason to believe," etc. The Supreme Court of Ohio held, that upon motion the court had authority to order the facts to be set out, but that generally the payee must know better than the maker what the facts were which influenced any belief he might have formed; and therefore the answer was held good (*Gabhart v. Sorrels*, 9 *Ohio N. S. R.*, 461).

The Supreme Court of Illinois has decided that, in an action by the indorsee of a promissory note against the maker, a plea intended as a plea of usury should aver that the note was payable to the original payee only colorably, and to evade the usury law, and that the transaction was, in fact, a direct loan of money from the indorsee to the maker of the note. An averment in the plea, that the indorsee "unlawfully, corruptly and usuriously" contracted with the maker, was declared to amount to nothing, unless facts are alleged showing wherein the usury consists (*Durham v. Tucker*, 40 *Ill. R.*, 519).

In Michigan, it was held, where an answer set forth the whole of a transaction in which usury was alleged, and showed the knowledge and participation of the complainant in the whole arrangement from which usury necessarily resulted, that it was sufficiently averred that complainant had notice of the usury (*Caruthers v. Humphrey*, 12 *Mich. R.*, 270). And in the State of Iowa it has been held that usury, though not directly pleaded,

may be set up by allegations showing that an unlawful rate of interest was agreed upon (*Kurz v. Holbrook*, 13 *Iowa R.*, 562).

In some of the States, as in New York, statutes exist regulating the practice and pleadings in courts, and containing provisions upon the subject of variances between the pleadings and proofs in an action. The Code of New York provides that no variance between the allegation in a pleading and the proof shall be deemed material, unless it shall *actually* have misled the adverse party to his prejudice in maintaining his action or defense (*Code of Procedure*, § 169). The Court of Appeals of the State have decided that the provisions of the Code of Procedure upon this subject are applicable to all actions, and have, therefore, changed the strict rules usually governing in cases of usury.

Johnson, J., delivered the opinion of the court, and, among other things, said: "We are not, I conceive, warranted in applying a different rule to the defense of usury from that which we would hold applicable in other cases. It is a defense allowed and provided by law. The defendant, in seeking to avail himself of the evidence, notwithstanding the variance, did not claim an indulgence from the court, but simply asked for the application of those rules which the legislature has provided for all cases indiscriminately, whether the party invoking their exercise was seeking to visit his adversary with a forfeiture or not. The law has not made any distinction between such defenses and those where no forfeiture is involved, and the court can make none" (*Catlin v. Gunter*, 11 *N. Y. R.*, 368, 375).

In a subsequent case in the same court it was held, where the answer averred usury in formal terms without stating the *quantum*, or a corrupt agreement for its payment, that the plaintiff was entitled to judgment for its frivolousness, and need not move to make it more definite and certain. The old rule was referred to which requires that the pleading shall contain averments of what the usurious agreement was, between whom it was made, the *quantum* of usurious interest that was agreed upon or received, and that the agreement was intentionally usurious and corrupt, all with particularity. And it was held that the present system of pleading in the State, which requires the facts constituting a defense to be plainly and concisely set forth, did not relax the rule (*Manning v. Tyler*, 21 *N. Y. R.*, 567). The same doctrine had been previously

declared in the Supreme Court of the State (*Fay v. Grimestead*, 10 Barb. R., 321, 329 ; *Gould v. Horner*, 12 *ib.*, 601).

The Court of Appeals of New York, in a case decided subsequent to the one in the 21st New York, held that an answer was sufficient to set up the defense of usury to an action on a promissory note where it states an agreement, upon the application for a loan, to give more than legal interest; and that the lender deducted from the amount for which, with interest, the note was made "almost enough, as he said, to buy a barrel of flour; which amount, as the defendants believe, was seven or eight dollars." The case in the 21st New York was considered and distinguished, although one of the judges thought that the case under consideration fell directly within the principle settled by the court in that case, and that the answer did not come up to the rule there laid down (*Dagal v. Simmons*, 23 N. Y. R., 491, 494, 495).

It may be suggested, and yet the suggestion would hardly seem to be necessary, that the defense of usury will never be received for the first time in an appellate court. The Supreme Court of the United States have recently declared that in an action on a note the defense of usury, to avail the defendant, must be made in the court below; that it cannot, for the first time, be set up in that court (*Ewing v. Howard*, 7 Wall. R., 499; and *vide Rutherford v. Smith*, 28 Tex. R., 332).

The pleadings may be amended in cases involving usury as well as in other cases; but where the amendment is not provided for, as a matter of course, the permission to amend is entirely in the discretion of the court, and the discretion is not as liberally exercised in these as in ordinary cases. As a general rule, the law does not deem it in furtherance of justice to allow a party to amend his pleading so as to enable him to defeat a recovery for the amount actually due by the defense of usury; and, hence, the court will not usually allow such amendments, unless the ordinary rule in such cases has been changed by statute. The defense of usury is regarded as a strict one, and if the party lets it slip or loses the benefit of it in any way, the court will not, as a general rule, relieve him. Usury is considered as an unconscionable defense, and if the defendant intends to rely upon it, he must take care to set it up at the proper time and in a proper way. He is not supposed to be entitled to any special favor for the purpose of enabling him to bring about a forfeiture of the debt he has created, or to

defeat a recovery of the money which he has actually borrowed. The authorities upon this subject are all the same way, and in harmony with this view.

The late Court of Chancery of the State of New York refused to open the proofs in a case to allow the defendant to amend his answer so as to admit the defense of usury, except upon the condition of the payment of the sum actually due, with lawful interest (*Fulton Bank v. Beach*, 1 *Paige's R.*, 429). This case was taken to the Court of Errors, where the chancellor's ruling was sustained.

Savage, C. J., in his opinion, said: "It is known to every lawyer that there are certain defenses which are legal, but which are not encouraged, and are sometimes called unconscionable. Thus, in a loan of money where there is an excess of interest, however much the excess contracted for may be over the legal rate of interest, it is usury, which avoids the security, and the creditor loses his whole demand. So, where an indulgent creditor permits the statute of limitations to attach, the presumption of the law is that the debt is paid, though the fact, generally, is otherwise. When defenses of this nature are interposed, and when the court must see and know that the defendant is seeking to avoid the payment of an honest debt, they will require him to bring himself within the practice of the court in the first instance, and if he makes a slip, they will not treat him with that indulgence which is freely extended to others. Hence, in a court of law, the defendant who is bound to plead usury is also bound to prove it as pleaded, and courts of law are cautious how they grant leave to amend to enable a party to sustain an unconscionable defense, or to aid him in a penal action" (*Beach v. Fulton Bank*, 3 *Wend. R.*, 573, 585, 586).

The courts of New Jersey have held that a defendant asking leave to defend, as a matter of favor, will not be allowed by a court of either law or equity to avail himself of usury (*Marsh v. Lasher*, 2 *Beasley's R.*, 253).

The Superior Court of the city of New York has decided that where the answer does not allege usury, a motion for the allowance of an amendment setting up such defense is properly refused (*Smalley v. Doughty*, 6 *Bosw. R.*, 66). But the Supreme Court of Wisconsin has held that an answer intended to set up usury as a defense may be amended to meet the proof. It was questioned, however, whether the court will allow an amendment to that effect

without an offer to pay the amount justly due (*Newman v. Kershaw*, 10 *Wis. R.*, 333).

The principle by which the courts were governed in these cases may be gathered from the considerations already presented, and, perhaps, nothing further need be said upon the point.

CHAPTER XXXV.

COMPOUNDING A PENAL ACTION FOR USURY — TRIAL OF AN ACTION INVOLVING USURY — COMPETENCY OF THE WITNESSES AND THE EVIDENCE IN THE ACTION — THE VERDICT AND JUDGMENT — OPENING DEFAULT AND GRANTING NEW TRIALS — THE CONSEQUENCES OF THE TRIAL IN PENAL ACTIONS FOR USURY.

It is not competent, as a general rule, for the prosecution, in a *qui tam* action for usury, to compound the action of his own volition; although he may compound and settle it with the leave of the court. Should the prosecutor settle the matter with the defendant without the leave of the court, he would be liable himself. But the court will almost always grant this leave, even after a verdict in the action (*Maughan, qui tam, v. Walker*, 5 *T. R.*, 48). In some cases the court has granted relief to a defendant in a *qui tam* action for usury, on payment of a part of the penalties incurred, where he is prosecuted to recover more than one forfeiture on account of usurious transactions; and where a rule has been obtained by the defendant for staying the proceedings on payment of part of the penalties, it seems that the court will grant an attachment against him for nonpayment (*Hart, qui tam, v. Draper*, 2 *Marsh. R.*, 358; *King v. Clifton*, 5 *T. R.*, 257). The rule in England in such cases is, that the attorney-general may enter a *nolle prosequi*, on behalf of the crown; but he cannot enter it except for the king's part of the penalty (*Stratton v. Taylor*, *Cro. Eliz.* 138). The same rule, doubtless, would be recognized in this country; though the prosecuting attorney here, possibly, would have to get the consent of the court in such a case. Where the action is brought by the borrower himself to recover usurious interest paid by him, he may compound and settle the action without applying to the court for leave to do so;

and yet if he was to discontinue the action without terms, it is probable that the action given to other parties on failure of the borrower to prosecute within the time limited by the statute, might then be brought. The trial of an action on account of usury is brought on and proceeded with in the same manner as other actions; and, as a general rule, it may be said that the proceedings on the trial in these cases are governed by the same practice which control in all others.

In respect to the competency of witnesses in these cases, where no statute intervenes, it has been decided, and such is the rule, that where an action *qui tam* is brought by a stranger, the borrower will be a competent witness to prove the usury after the repayment of the money (*Long's Case*, 1 Vent. R., 191); and it is not discovered how the action could be sustained in any event, unless the money had been repaid, for there can be no usury for which an action can be brought, until the money borrowed and the legal and excessive interest have been paid; at least, such is the general rule, although there is an occasional instance where the statute gives an action for the simple *agreement* to take usury. But it was anciently held that, in order to let in the borrower's evidence, it was necessary to show that the money had been repaid. And in one case, the court refused to let the borrower himself prove the repayment, conceiving that, until the money was shown to have been repaid, he could be no witness at all (*Shank, qui tam, v. Payne, Strange's R.*, 633). Subsequently, however, the English Court of King's Bench held that the borrower was a competent witness to prove both the usurious contract and the repayment of the money; because they thought that the repayment itself established his competency and credit.

Lord Mansfield delivered the opinion of the court, and, among other things, said: "The objection to the competence of the witness can only be supported by arguing either 'that the event of this penal prosecution in favor of the plaintiff will *avoid* the bond, assurance or contract of the witness, and *discharge* him from the debt;' or 'that the cause turns upon the *same* points and transactions which, if proved in *another* cause, would avoid the same.' The foundation fails in both propositions, and the consequence would not follow in the last, if the premises were true.

No contract or assurance appears here for usury; or so much as to repay the money. And if there was, the recovery of the

penalty upon this information would not affect the contract. * * * But if it be necessary to prove payment, and the party is not to be heard as a witness to prove such payment, the statute would be as effectually repealed as if the borrower could never be a witness at all; for they never would suffer anybody else to be privy to the payment, delivering up, or canceling the securities" (*Abrahams v. Brown*, 4 Burr. R., 2251, 2253, 2256).

This decision has since been reviewed and confirmed in a case where an action had been brought to recover the penalties of the statute upon a loan and forbearance to one Brown, who was called as a witness to prove the transaction. In addition to his being the borrower, it appeared that he was an uncertificated bankrupt; and although the sums paid in the declaration had been paid with the lawful interest, still he was largely indebted to the defendants on a running account for different loans, in which the sums declared on were included. Lord Kenyon suffered him to be a witness, thinking that the objection went to his credit, and not to his competency (*Smith, qui tam, v. Prager*, 2 Esp. N. P. C., 486). And this opinion he afterward confirmed, on a motion for a new trial (*Smith, qui tam, v. Prager*, 7 T. R., 60; and vide *Burt v. Baker*, 3 ib., 27). So that, in addition to its being established under the English statute that the borrower might prove the whole case, it seems that not even his being indebted to the defendants on a *general* balance would affect his competency, provided the particular sums in question had been paid.

But the English courts decided that in an action on the statute against the assignee of a bankrupt, for taking usurious interest on a loan of money to the bankrupt before his bankruptcy, the bankrupt was not a competent witness to prove the offense, if he had not obtained his certificate, or repaid the money; notwithstanding he was willing to give a release to his assignees of the benefit which might arise from the discharge of this debt in particular, and all claim to allowance or surplus in general; and notwithstanding the assignee had proved his demand for the money lent under the commission (*Masters, qui tam, v. Drayton*, 2 T. R., 496).

The Supreme Court of Delaware has held that the obligor in a bond given on a usurious contract is a competent witness to prove the usury in an action *qui tam* (*Bonner v. Gregg*, 1 Harring. R., 523). And the Supreme Judicial Court of Massachusetts held that upon an indictment for taking excessive usury the borrower

is a competent witness for the prosecution, if he be not entitled to a part of the penalty by inference, notwithstanding he has never repaid the money borrowed (*Commonwealth v. Frost*, 5 *Mass. R.*, 53; and *vide Pettingill v. Brown*, 1 *Caines' R.*, 168).

It may be affirmed, therefore, that a person who has borrowed money on a usurious transaction is a competent witness for the plaintiff in an action for penalties against the lender; and whether he has or has not repaid the money lent does not appear to make any essential difference, at least so far as his competency is affected, for in neither case does he gain anything immediately by the event of the suit, nor can he give the judgment in evidence in an action against him for the money lent.

The Supreme Judicial Court of Massachusetts has also held that in an action to recover back usurious interest paid, the original debtor is a competent witness under the statutes of that State (*Gifford v. Whitcomb*, 9 *Cush. R.*, 482).

In some of the States, as in New York, the statute provides that no witness shall be excluded on the ground of interest; and the parties to the action may be sworn for or against themselves. When such is the law, scarcely any question can arise as to the competency of witnesses in any action; although it may be affirmed that, as a general rule, a party cannot be *compelled* to give evidence against himself upon an issue of usury, for the reason that no person is bound to give evidence which may involve him in a forfeiture or a criminal prosecution.

As to what will be evidence against a defendant in an action for usury, it was held by the Court of Common Pleas of England, where the usury was in discounting a bill, and it appeared that one Brown demanded payment of the acceptor, and commenced an action against him in order to compel payment, in consequence of which a person on behalf of the acceptor paid to Brown the amount of the bill and the costs of the suit on producing the bill, for which Brown gave a receipt as the attorney for the defendant, and no account was given how Brown came by the bill, that there was sufficient evidence to be left to a jury that Brown acted as the defendant's agent, and consequently that the defendant had received usurious interest (*Owen, qui tam, v. Barrow*, 4 *Bos. & Pull. R.*, 101).

It must be remembered that, upon the issue of usury, presumptions, as in ordinary actions, are not to be indulged. In fact, the

presumption is always in favor of the innocence of the party and the legality of the transaction, and hence the evidence of usury must be clear and convincing before the allegation can be sustained.

It has been previously shown that usury must be proved substantially as it is averred in the pleading, and it must be proved to have been received from the person named in the information as having paid it or from his agent (*Swinney v. State*, 14 Ind. R., 315). And the information must aver, and the prosecution must prove, a corrupt or usurious intent (*Block v. State*, 14 Ind. R., 425).

The courts of New Jersey have held that when usury is relied on as a defense to a contract or other instrument, it is not enough that the relation of the witnesses to each other, and the circumstances sworn to by them, render it highly probable that the transaction was usurious; that the usury must be proved, not left to conjecture. Nor will it avail the defendant that the case makes out usury, if it is not the case made by the answer. The corrupt agreement must be distinctly set up and proved, as alleged (*New Jersey, etc., Company v. Turner*, 1 McCarter's R., 326).

The Supreme Judicial Court of Massachusetts has held that, where more than six per cent interest was paid on a promissory note, made in that State, and not appearing on its face to be payable elsewhere, evidence was inadmissible, in an action to recover back the usurious interest, that the note and a promise made at the same time to pay more than six per cent interest were in pursuance of an oral agreement previously made in another State, where the rate of interest paid was the lawful rate (*Hollenbeck v. Shutts*, 1 Gray's R., 431). It may be stated that it is competent for a party to show an agreement by parol to pay an additional sum at some future day, as interest on a note or bond on which the lawful interest is reserved, and such proof will render the transaction usurious. And if different instruments are given, they may be considered as one transaction. So one may give a note for a part of a debt and agree by parol to pay the balance, and the effect will be just the same as though the written and parol contract were merged in one. The law will not be defeated by any device to cover usury. The authorities are numerous to illustrate this doctrine (*Vide Macomber v. Dunham*, 8 Wend R., 554; *Merrills v. Law*, 9 Cow. R., 65; *Hammond v. Hopping*, 13 Wend. R., 510, 511; *Austin v. Fuller*, 12 Barb. R., 360, 363).

As to the evidence for the defendant in a *qui tam* action, it was held by the English courts that where it had been proved that the defendant had taken from one Sebank fifty pounds for the loan of £1,000, for six months, it was not competent for the defendant to give in evidence an account in the handwriting of Sebank, wherein he admitted part of this fifty pounds to have been paid on the balance of an old account (*Maughan, qui tam, v. Walker, Peake's N. P. C.*, 163).

Where usury is set up as a defense to an instrument which has been assigned, the action to enforce which is prosecuted by the assignee, it is not competent for the defendant to give in evidence the declaration of the assignor of the instrument made prior to his assignment of the same, to show that it was given upon a usurious loan. The rule of the law of evidence which excludes hearsay testimony is of great practical value, and it has been held by the New York Court of Appeals to apply to a case of alleged usury, as well as in any other (*Booth v. Swezey*, 8 *N. Y. R.*, 276).

That the lender was in the habit of lending on usury is no ground for presuming usury in a particular transaction, and, indeed, such evidence would be improper to establish the fact of usury in the latter transaction (*Jackson v. Smith*, 7 *Cow. R.*, 717).

But though usury in a particular case cannot be established by proof of former usurious transactions between the parties, yet, if it fall within a general usurious arrangement between them, that may be proven (*Keutgen v. Parks*, 2 *Sand. R.*, 60). The defense to an action on a note was usury. There was no direct evidence of a usurious negotiation of it to the plaintiff; but some days afterward the borrower paid to the lender, for the use of the money from the time of borrowing to the time of payment, interest to an amount indicating a usurious rate. The New York Court of Appeals held that this was some evidence of an agreement for a rate of interest which would produce that amount coeval with the loan. The court declared that evidence of prior usurious loans would not alone affect the contract; but connected, as that evidence was, with the subsequent receipt of usurious interest for all the time which elapsed between the loan and the receipt of that money, it made a case to be left to the jury (*Catlin v. Gunter*, 11 *N. Y. R.*, 368; *vide Ross v. Ackerman*, 46 *ib.*, 210).

The Superior Court of the city of New York, at Special Term, decided that it is not evidence of usury that one borrowing money

makes a gratuity to the lender over and above the interest, unless such acts are continued for a longer period of successive borrowing and payments (*Stover v. Coe*, 2 *Bosw. R.*, 661).

The Supreme Court of the State of New York recently laid down the doctrine that a verdict finding usury should doubtless be based upon clear and satisfactory evidence, as, by the statutes of this State, it involves by way of penalty the loss of the whole debt; but that the charitable rule giving to defendants, in favor of life or liberty, the benefit of every reasonable doubt, should not be extended to civil actions in which the question of usury is involved (*Porter v. Mount*, 45 *Barb. R.*, 422, 427).

Evidence that the defendant acted as the agent of another in the taking of usury will not excuse him from the consequences of his act, unless it be made to appear that he disclosed his agency at the time he made the usurious contract (*Wilkes v. Coffin*, 3 *Hawks' R.*, 28). And it seems doubtful whether an agent who lends the money of his principal at usurious interest can escape the penalties imposed by the statute against usury by proof that he disclosed his character as agent at the time of the transaction (*Vide Dowell v. Vannoy*, 3 *Dev. R.*, 43; *Commonwealth v. Frost*, 5 *Mass. R.*, 53).

If the contract which is alleged to be usurious shows usury upon its face, the usury will be established by the introduction of the contract, and proof that it has been performed. But where the contract does not, by its terms, import usury, it must be proved, in all cases, that there was some corrupt agreement, device or shift, to cover usury (*Moody v. Hawkins*, 25 *Ark. R.*, 191). And where usury is pleaded as a defense to an action, the burden of showing the interest excessive, and of proving it to be so, is always upon the defendant (*Hale v. Hasilton*, 21 *Wis. R.*, 320; *Harusharger v. Kinney*, 6 *Gratt. R.*, 287).

Where an action on a note is defended on the ground that it is void under the usury laws of a sister State which govern the contract, the legal rate of interest in such State must be made to appear, or else the note will be declared valid (*Kenyon v. Smith*, 24 *Ind. R.*, 11).

The evidence upon an issue of usury must substantially sustain the averments of the pleading, or the variance between the evidence and the pleading will be fatal (*Wilmot v. Munson*, 4 *Day's R.*, 114). And the evidence must establish, not only the mak

ing of a usurious contract, or the taking of a bond or other obligation to secure it, but that the usurious interest was actually received by the lender (*Thomas v. Watson*, 1 *Taney's R.*, 237).

In respect to the verdict in a *qui tam* action for usury, it was held in England, at a very early day, that when an information was brought against two, and only one was found guilty, there could be no judgment in the case (*Page's Case*, *Lane's R.*, 13; *Varia v. Austin*, *Ib.*, 59). But it has been held by the American courts that in debt *qui tam* for the forfeitures under the usury statutes, a verdict may be taken for less than the plaintiff declares for (*Dozier v. Bray* 2 *Hawks' R.*, 57). By an old English case, it seems that if upon *nil debit* pleaded the jury find a usurious receipt of money and did not find any loan, a new *venire* should be awarded, and not a new *nisi prius* (*Loveday's Case*, 8 *Coke's R.*, 130). But the practice at present in usury, as well as other cases, is for the jury to find a verdict for the plaintiff or the defendant, without qualifying terms; so that a verdict for the plaintiff in a *qui tam* action for usury implies all that is necessary to constitute the cause of action.

When a party sets up usury as a defense to an action, but by some mishap a default is taken against him, the court will open the default, ordinarily, as in other cases. Inasmuch as the defense of usury is regarded as unconscionable, it has sometimes been supposed that no *favor* will be extended to the party who attempts to avail himself of it. But the old Supreme Court of the State of New York, in setting aside an inquest taken at the circuit, declined, in addition to the usual terms of ruling, to impose the condition that the defendant should abandon the defense of usury which had been regularly interposed.

Bronson, J., in his opinion, said: "It is, no doubt, the constant practice, in these appeals to the equity powers of the court, to impose such terms on granting relief as the special circumstances may seem to require; and where a defendant has let slip the opportunity of pleading what has sometimes been called an unconscionable defense, as the statute of usury or of limitations, leave to plead anew has been denied (*Buck v. Fulton Bank*, 3 *Wend.*, 585, 587, and cases cited, *per Savage*, *Ch. J.*).

"There may be cases where, in the exercise of a sound discretion, we should refuse to set aside an inquest regularly taken, or to grant any other favor to the defendant which would enable him to set up a hard and inequitable defense. But here the plaintiff does

not ask to add a new plea; his defense was interposed at the proper time, and it has been lost by the mere accident that his counsel forgot to prepare an affidavit of merits in due time. There has been no delay. The plaintiff may still have a trial as soon as it could have been obtained, if the cause had taken its regular course on the calendar. If we impose a condition requiring the defense of usury to be abandoned, we must, in effect, say that any accident by which the plaintiff obtains a regular default will always exclude this defense. I cannot go so far. Whatever we may think of the policy of the statute against usury, it is our duty to enforce it so long as it remains on the statute book. The nature of the defense should never be taken into consideration in granting applications of this kind, except under very special circumstances" (*Allen v. Mapes*, 20 *Wend. R.*, 633, 634).

The judgment in cases of usury are entered up, upon the verdict, the same as in other cases, and motions for new trial and appeals from the judgment are made and taken in them, the same as in other cases; a uniform practice, in these respects, governing them all.

A verdict in such a case, without evidence or against evidence, will be set aside. And the Supreme Court of Georgia has held that a general verdict for the defendant upon the plea of usury, in the absence of proof of any definite amount of usury paid by the parties, is against evidence, and bad upon exceptions taken (*Holland v. Chambers*, 22 *Geo. R.*, 193).

It has been held in Alabama that to authorize a reversal of the judgment at the defendant's instance, on account of the refusal of the court below to impose the costs on the plaintiff, where the plea of usury was successfully interposed, the record must show that an intentional reservation of usurious interest was proved; that if the bill of exceptions does not purport to set out all the evidence, the appellate court cannot infer that this proof was made from the mere fact that the plaintiff recovered a judgment for less than the amount of his note (*Black v. Hightown*, 30 *Ala. R.*, 317). This policy, in respect to costs, is, doubtless, peculiar to the Code of Alabama; and, hence, the authority might not be regarded as of general application.

In the State of Iowa it has been held that, where on appeal the errors assigned are the rulings of the court below as to usury, the plaintiff may remit the amount of the usury claimed, and have

judgment in the appellate court for the sum to which he is properly entitled (*Thompson v. Purnell*, 10 Iowa R., 205).

This practice may be adopted in all cases where the statute does not make the entire contract void on account of usury, but provides for a deduction of the excessive interest, or the whole interest from the principal, in case usurious interest is reserved.

It was held, under the old English statute, that if the prosecutor be nonsuited, this should not prejudice the crown (*Stretton v. Taylor*, Cro. Eliz., 138). Something like this, perhaps, might be recognized in this country. Where the statute of usury gives an action in favor of the borrower for the forfeiture, in case he prosecutes for the same within a specified time, and upon his failing to bring the action, then providing that an action *qui tam* or the like may be brought for the forfeiture; in such case, if the action should be brought by the borrower and fail, probably it would not bar the subsequent action.

CHAPTER XXXVI.

USURY AS A CRIME—THE OFFENSE AT COMMON LAW—THE OFFENSE BY STATUTE—WHEN THE OFFENSE IS COMPLETE—THE INDICTMENT AND EVIDENCE.

THE books are not fully agreed as to whether or not usury is a criminal offense, for which an indictment will lie at common law. Certain it is, that it is very unusual to proceed against the lender of money upon usury by indictment. It seems that the taking of exorbitant, or, as it was called, *Jewish* interest, was a misdemeanor at common law, before the enactment of prohibitory statutes, in England. It is, indeed, laid down by some writers, that the taking any consideration for the loan or forbearance of money was an offense cognizable by the ecclesiastical courts, and liable to severe spiritual censures (*Hawkins*, b. 2, ch. 82, § 4). At one period, in England, unless the usury taken exceeded forty per cent, the sum named as Jewish, it was expressly held that no indictment at common law could be supported. The statute 12 Car. II, ch. 13, which fixed the rate of interest at six, and the 12 Anne, stat. 2, ch. 16, which reduced it to five per cent, though they gave a penalty, partly to the king and partly to the informer, both pro-

hibited the act to be done in positive terms, and without any reference to the mode of proceeding; and, when this is the case, any person who disobeys the provision is held to be guilty of an offense for which an indictment will lie. Sometimes this rule of the common law is re-enacted by the statute. For example, by the statutes of New York it is declared that when the performance of any act is prohibited by any statute, and no penalty for the violation of such statute is imposed, either in the same section containing such prohibition or in any other section or statute, the doing such act shall be deemed a misdemeanor (2 *R. S.*, 696, § 39; 2 *Stat. at Large*, 719). The general rule is, that where a statute creates a new offense, by prohibiting and making unlawful anything which *was lawful before*; and appoints a *specific remedy* against such new offense (*not antecedently unlawful*), by a *particular sanction* and *particular method* of proceeding, *that particular method* of proceeding must be pursued (*Castle's Case*, *Oro. Jac.*, 648). But when the offense was antecedently punishable by a common-law proceeding, and a statute prescribes a particular remedy by a summary proceeding; then, *either* method may be pursued, and the prosecution is at liberty to proceed either at common law or in the method prescribed by the statute; because there the sanction is *cumulative*, and does *not exclude* the common-law punishment (*Stephens v. Watson*, 1 *Salk.*, 45; and *vide Rex v. Robinson*, 2 *Burr. R.*, 799, 803).

It was held in one case in England that no indictment would lie for usury, but the parties who chose to prosecute must proceed to recover the penalties in a penal action (*Queen v. Dy*, 11 *Mod. R.*, 177). And it was generally conceded that no criminal proceeding could be maintained under the statute of 12 Anne for a mere agreement to take illegal interest, in pursuance of which nothing was carried into execution. But on the general principle just stated, which seems very clearly laid down, an indictment would lie under statutes similar to that of the 12 Anne, where the usurious transaction was completed.

The opinion was entertained and expressed by very eminent barristers in England, as late as 1814, that in a clear and palpable case of usury a party might be indicted at common law. But it seems now to be generally conceded that usury is illegal only as it is made so by statute law; and, hence, unless the taking of more than the legal rate is forbidden by the statute, the only consequence

of taking it must be that declared by the statute. When, however, the statute actually forbids the taking of usury, a violation of the statute would be regarded as a misdemeanor, unless some other consequence is declared by the statute as the result of such violation.

The statutes of some of the States contain a provision making usury an indictable offense, and prescribe the punishment of it as such. The statute of the State of New York enacts that any person who shall, directly or indirectly, receive any greater interest, discount or consideration than is prescribed in the act, and in violation of the provisions of said act, shall be deemed guilty of a misdemeanor, and, on conviction thereof, the person so offending shall be punished by fine not exceeding \$1,000, or imprisonment not exceeding six months, or both (*Laws of 1837, ch. 430, § 6; 4 Stat. at Large, 460*).

Under this statute, the mere agreement for a usurious premium, to be paid at a future day, does not constitute the criminal offense of usury. The act makes only the actual taking of usury an indictable offense. But when there is an agreement to receive usurious interest, a subsequent receipt of any portion of the usurious premium completes the misdemeanor (*Vilas v. Jones, 10 Paige's R., 77; Henry v. Bank of Salina, 5 Hill's R., 523*).

This statute of New York has not often been enforced against the usurer criminally, and yet occasionally a person has been indicted and convicted under the statute. A case of the kind was recently passed upon by the Court of Appeals of the State. One Burdick, the owner of a farm which was subject to a mortgage held by Sumner, the defendant, being in arrears in his payment of principal, applied to the defendant on the 30th of November, 1857, for an extension of time. After some negotiation between the parties, Burdick signed an agreement in these words: "If I do not pay N. Sumner the \$800 I owe him by December 5th, 1857, I will give him sixteen dollars extra. November 30th, 1857." The defendant was indicted for taking usury, and upon the trial this agreement was given in evidence, at which time there was a receipt for the sixteen dollars indorsed upon it in the handwriting of the defendant. Burdick was examined and cross-examined as to the circumstances at considerable length. His testimony was somewhat confused, but he was clear as to his having paid the sixteen dollars; and as to the time of paying the principal and law-

ful interest, and upon these points there was no contradiction; although it was not clear at what precise time the sixteen dollars were paid. The only other witness sworn on the trial was a brother of Burdick, who testified to an admission of the defendant that Burdick had paid him two per cent extra beside the interest.

On the testimony being closed the defendant's counsel moved that the court direct a verdict for the defendant, which was denied and the counsel excepted. The counsel for the defendant then requested the court to charge the jury, that if the sixteen dollars extra were paid to the defendant by Burdick, "on the happening of any contingency over which the said Burdick had a control, it was not usury." The court declined so to charge, and the defendant's counsel again excepted. The defendant was convicted, and the court sentenced him to pay a fine of \$100. The judgment was affirmed by the Supreme Court, and the case was then taken to the Court of Appeals by writ of error. The latter court reversed the judgment on the ground that the case was not properly submitted to the jury in the court below. It was admitted, however, that the decision of the jury, if there were no errors in the instructions of the court, would bind the parties. But it was held that the jury should have been charged as requested, "that if the sixteen dollars was to be paid by Burdick on the happening of any contingency over which the said Burdick had control, it was not usury" (*Sumner v. The People*, 29 N. Y. R., 337).

Usury, as a crime, does not consist in the *intent* to take but in the actual taking of more than the legal rate of interest. It is well settled, both in this country and in England, that until the lender has received more than principal and interest, bonus included, for the sum actually advanced, the offense of usury is not consummated. It is not committed by payment of a premium less in amount than the legal interest; nor by the *agreement* to take more than the legal rate. Till more than the legal interest on the loan is taken by the lender, the offense is not complete.

The Supreme Court of Tennessee has recently held that the gist of the offense of usury, under the laws of that State, is the reception of the money. That the mere contract or agreement for the payment of more than the legal rate of interest is not, of itself, while unexecuted, the subject-matter of a criminal prosecution. The court, however, decided that if the parties, in order to evade the law, go into another State and make the usurious con-

tract, and the usurious interest is afterward received in Tennessee, a criminal prosecution will lie (*Murphy v. State*, 3 *Head's R.*, 249).

The Supreme Court of the State of Indiana has held that usury, as an indictable offense under the statute then in force, consisted in the taking or receiving unlawful interest, and not in merely contracting for such interest (*Livingston v. Indianapolis Insurance Company*, 6 *Blackf. R.*, 134).

The Supreme Court of Pennsylvania has held that the offense of usury is complete when more than legal interest is received "for the loan or use of money," or "for the forbearance" of it, on any bond or contract (*Agnew v. McElhan*, 18 *Penn. R.*, 484, 487).

The doctrine of these cases, as to what constitutes the offense of usury, is uniformly recognized as correct, and perhaps no authority can be found which holds to the contrary. A contract may be avoided by the corrupt agreement to take or receive of the borrower more than legal interest; while an indictment will not lie until the usurious interest has been actually received.

The indictment for the offense of usury must contain all the requisites of a declaration or complaint in a *qui tam* action for usury; and the evidence to sustain the indictment must be clear and sufficient to establish each and every material averment, beyond a reasonable or rational doubt, or the prosecution must fail.

The Law of Usury, Pawns or Pledges, and
Maritime Loans.

PART II.

OF THE LAW OF PAWNS OR PLEDGES.

CHAPTER XXXVII.

DEFINITION OF A PLEDGE OR PAWN — HISTORY OF THE CONTRACT OF PLEDGING OR PAWNING PERSONAL PROPERTY AS A SECURITY FOR DEBT.

THERE are few subjects connected with the commerce of this country which are of more general importance and less generally understood, or less adequately ascertained, than the law regulating pledges or pawns. There is hardly a business man in any community who does not, every month and almost every day, contract the obligations or acquire the rights of a *receiver* or a *giver* in pledge, while he, at the same time, may be really quite ignorant of the nature or extent of the duties which bind him, and has no just idea of the rights which he thereby enjoys. It has been justly remarked that contracts of bailment, including those of pledges or pawns, are among the principal springs and wheels of civil society; and that "if a want of mutual confidence or any other cause were to weaken them or obstruct their motion, the whole machine would instantly be disordered or broken to pieces. Preserve them, and various accidents may still deprive men of happiness; but destroy them, and the whole species must infallibly be miserable" (*Jones' on Bailment*, 2). This being so, it is obvious that so important a branch of jurisprudence should be perfectly well settled and reasonably well understood.

A mortgage of personal property is often confounded with a pledge or pawn, when, in the common law, there is an essential difference. A pledge or pawn is the bailment of goods to a creditor as security for some debt or engagement. This is the definition of the word adopted by Story and other writers upon the subject. In the civil law, that was properly called a *pignus* (pledge), where the thing was delivered to a creditor. If it remained with the debtor, though pledged as security, it was called a *hypotheca* (hypothecation). A mortgage is an absolute pledge where the legal property passes, with a condition of defeasance. A pledge or pawn of goods is a deposit of them as security, and a delivery is essential. The general property does not pass as it does in the case of a mortgage.

Pledges for debt are of the highest antiquity. There is the best of reasons for believing that the contract originated many centuries before the invention of a circulating medium, and that the relation of pawnor and pawnee was constituted between persons removed, by only a few generations, from our primeval ancestors, Adam and Eve.

A late English writer upon the Contract of Pawn, has taken pains to compile, from the most authentic sources, a history of the practice of depositing property as a security for goods or money lent; and from his statement it appears quite certain that the relation of pawnor and pawnee actually existed about 500 years before the children of Israel became a separate nation. The earliest known instance of the contract of pawn is recorded in a passage in the book of Genesis, wherein it appears that Judah, the son of Jacob, was the pawnor, and Tamar, his daughter-in-law, was the pawnee. The property pledged was a signet, and bracelets, and staff, and the pledge was made to secure the lending of a kid to the pledgee (*Genesis xxxviii*, 17, 18). From the manner the story is told, it is manifest that the custom of pawning was both common and well established in the patriarchal age, and it would seem that the subject of pledges was regulated by the laws of Moses. "If thou at all take thy neighbor's raiment to pledge, thou shalt deliver it to him by that the sun goeth down." The reason for the injunction is given in the following verse: "For that is his covering only, it is his raiment for his skin, wherein shall he sleep. And it shall come to pass, when he crieth unto me that I will hear, for I am gracious" (*Exodus xxii*, 26, 27). The same tender regard of the Mosaic laws, for the interest of the pledgor, is also shown in the prohibition to take the upper or nether millstone in pawn. "No man shall take the nether or the upper millstone to pledge, for he taketh a man's life to pledge" (*Deut. xxiv*, 6). Handmills were then generally used in every family for grinding their corn; and men would be deprived of the means of preparing their necessary food if their millstones were taken from them. The same spirit is manifest in the prohibition for one to enter into his brother's house in quest of the pledge on which to lend his money, for "the man to whom thou dost lend shall bring out the pledge abroad unto them" (*Deut. xxvi*, 10, 11). That is to say, the Israelites were permitted to take a pledge of their brothers to secure the loan of money, provided it was something which the borrower could

conveniently part with, and which he willingly proposed. The same reason holds good against money in pledge, or distraining for debt any of those instruments of labor by which men are accustomed to earn their living, or for any of those articles actually necessary for the present comfort and support of the debtor and his family.

So, also, in the same spirit, by the Mosaic institutions, if the borrower, in his necessity, brought out and tendered in security for the loan what he could not well spare, the lender was commanded for conscience toward God to restore it by sunset. "And if the man be poor, thou shalt not sleep with his pledge; in any case thou shalt deliver him the pledge again when the sun goeth down, that he may sleep in his own raiment and bless thee; and it shall be righteousness unto thee before the Lord thy God" (*Deut.* xxiv, 12, 13). And in the same spirit the lender was forbidden to "take a widow's raiment to pledge" (*Deut.* xxiv, 17).

The subject of pledges, as security for debt, is also referred to, and rules laid down or opinions expressed in regard to them in Job, in the Proverbs and in Ezekiel, all going to show that the custom of taking property in pledge was prevalent among the Jews from the very earliest periods, and that the matter was regulated by law, which was well understood and recognized by them.

In China, pawnbrokers are very numerous at the present day. They are kept under strict regulations, and no one must act as a pawnbroker without a license, under pain of severe punishment. It seems that three years is the usual period during which a pledge may be redeemed, and three per cent per month is the highest legal rate of interest. But in winter the monthly interest on pledges of wearing apparel is restricted to two per cent, "that the poor may be able the more easily to redeem" (2 *Davis' China*, 418). And as most Chinese institutions are but stereotyped copies of originals many hundred years old, it is very probable that those regulations applied to the Chinese pawnbrokers of hundreds and perhaps thousands of years ago, as completely as they now do to their successors of the present day.

Sir William Jones says that "pledges were used in very early times by the roving Arabs, one of whom finely remarks 'that the life of man is no more than a *pledge* in the hands of destiny'" (*Jones on Bailment*, 84). This sentiment is peculiarly oriental; it is naturally suggested by the hazardous vicissitudes which attend

the pursuits of the wandering Arab. Under its *religious* influence, the believers in Mohammed have fiercely encountered the dangers of battle or have supinely fallen by the ravages of the plague. It has tolerated the horrors of a bloody and degrading despotism, and it supplies the "*carpe diem*" in the voluptuous effusions of the eastern poets.

The distinction between *pledging*, when possession is transferred to the creditor, and *hypothecation*, when it remains with the debtor, was originally Attic; but scarce any part of the Athenian laws on this subject can be gleaned from the ancient orators, except what relates to bottomry in five speeches of Demosthenes. So says Sir William Jones, in his essay on bailments before referred to.

In respect to the Turkish law of pledges, Sir William Jones mentions a singular case from a curious manuscript which he discovered at Cambridge, which contained a collection of queries in *Turkish*, together with the decision of the MUFTI at Constantinople. Sir William Jones says: "It is commonly imagined that the *Turks* have a translation in their own language of the *Greek* code, from which they have supplied the defects of their *Tartarian* and *Arabian* jurisprudence; but I have not met with a translation, although I admit the conjecture to be highly probable, and am persuaded that their numerous treatises on *Mahomedan* law are worthy, on many accounts, of an attentive examination. The case was this: '*Zaid* had left with *Amru* divers goods in pledge for a certain sum of money, and some *ruffians*, having entered the house of *Amru*, took away his own goods, together with those pawned by *Zaid*.' Now, we must necessarily suppose that the creditor had, by *his own* fault, given occasion to this robbery; otherwise we may boldly pronounce that the *Turks* are wholly unacquainted with the imperial laws of *Byzantium*, and that their own rules are totally repugnant to natural justice; for the party proceeds to ask 'whether, *since the debt became extinct by the loss of the pledge*, and since the goods pawned exceeded in value the amount of the debt, *Zaid* could legally demand the balance of *Amru*;' to which question the great law-officers of the *Othman* court answered, with the brevity usual on such occasions, *Olmaz, it cannot be*. This custom, we confess, of preparing cases, both of law and conscience, under *feigned* names, to the supreme judge, whose answers are considered as solemn *decrees*, is admirably calculated to prevent partiality, and to save the charges of litigation" (*Jones on Bailment*, 85, 86).

The Hindoos have always, from their earliest history, recognized pledges, and have had laws regulating the rights of pledgor and pledgee. By the present laws of the Hindoo nation, a pawnee or other depositary, who undertakes to keep goods, must preserve them with care and attention; but he is not bound to restore the value of them if they are spoiled by unforeseen accident, or burned, or stolen, unless he conceal a part of them that has been saved; or unless his own effects be secured; or unless the accident happen after his refusal to redeliver the goods on demand made by the depositor, or while the depositary, against the nature of the trust, presumes to make use of them. In other words, the "pledgee is made answerable for *fraud*, or for *such negligence* as approaches to it" (*Gentoo Laws*, ch. 4). The words of this part of the Braminical institutions are solemn and remarkable. They prove that the oriental notions on the subject of hospitality to *persons* are extended with scrupulous consistency to the deposit of goods. "If a person should make use of any property intrusted to him, or it be spoiled for want of his care and attention, then whatever crime it is for a woman to abuse her husband, or for a man to misuse his friend, the same degree of guilt shall be imputed to him, and the value of the trust must be made good" (*Gentoo Laws*, ch. 4, p. 120). In view of the Persian and Arabian laws upon the subject of pledges and other bailments, Sir William Jones says: "All these provisions are consonant to the principles established in this essay; and I cannot help thinking that a clear and concise treatise, written in the *Persian* or *Arabic* language, on the law of contracts, and reviewing the general conformity between the Asiatic and European systems, would contribute, as much as any regulation whatever, to bring our English law into good odor among those whose fate it is to be under our dominion, and whose happiness ought to be a serious and continued object of our care" (*Jones on Bailment*, 124).

The ancient Romans were very explicit in their laws regulating the rights and duties of pledgor and pledgee; and the principles of their laws upon the subject have been largely incorporated into the laws of England and America upon the same subject.

But the history of pledges or pawns in England contains more of general interest than that of any other nation, ancient or modern. It seems that the Jews, who first settled in England about the year 750 after Christ, were the first professed pawnbrokers, as

well as the first money-lenders, in that country. They carried on both trades until their expulsion by Edward I. The principal seat of this order in London, and in the kingdom, was in Old Jewry. The interest which they charged varied from about forty-five to sixty-five per cent per annum; and in some instances they exacted even more than the latter figure. It is recorded that in 1264, the rabble attacked and destroyed the synagogue, because a Jew had endeavored to exact from a Christian man more than the then legal rate of interest of twopence per cent for a debt of twenty pounds the latter owed him. The populace took a bloody revenge for the attempt at extortion. A riot ensued, in which 700 Jews were killed by the mob. A few years later the Jews were forbidden to take interest at all, on pain of death; and as the hatred of Jews grew too intense, both in governors and governed, to allow the unfortunate Israelites to remain in the country, even, when continually subjected to pillage and persecution, they were ultimately expelled by Edward I, in 1290. After their expulsion, the trade of pawnbroking in England fell almost entirely into the hands of the Lombard merchants, who, it is certain, had previously adopted the practice of taking pledges for loans, both of large and small sums of money, since by them Richard I was accommodated with a considerable amount of money on loan; and his successor's written guarantee to pay the debt is supposed to be the earliest known instance of a letter of credit, afterward so much in use as a bill of exchange (*Hallam's Middle Ages, 5th edition, vol. 3, p. 405*).

The Lombards continued to thrive by their pawnbroking and money-lending, though taking interest was not made lawful till 1546, when the legal rate was fixed at ten per cent, which was afterward changed from time to time, as shown in a previous chapter (*ante, ch. 2*).

The earliest legislative notice of pawnbrokers, as such, in England, is not regarded as very flattering. It is contained in the statute 1 Jac. I, ch. 21, the preamble of which recites, that "forasmuch as of long and ancient tyme, by divers hundred yeeres, there have been used within the Citie of London, and the Liberties thereof, certain freemen of the Citie, to be selected out of the Companies and Mysteries, whereof they are free and members;" who were to be recommended to the Lord Mayor and Aldermen, as "persons meete for to be broker or brokers;" and who were

to be admitted on taking "their corporall oaths to use and demean themselves uprightlie and faithfullie between merchant Englishe and merchant strangers and tradesmen;" and those brokers "were, of very ancient tyme, used to buy and sell garments, household stuffe, or to take pawnes and billes of sale of garments and apparel, and all things that come to hand, for money laide out and lent upon usurie; as now of late yeeres hathe, and is used by a number of citizens assuminge unto themselves the name of brokers and brokerage, as though the same were honeste and a lawfull trade, misterie, or occupation, tearminge and naminge themselves brokers, whereas in truth they are not, abusinge the true and honeste ancient name and trade of broker and brokerage; and forasmuch as many citizens, freemen of the citie, being men of manuell occupation, * * * have lefte and given over, and daylie doe have and give over, their handie and manuell occupations; and have and daylie doe, set up a trade of buyinge and selling, and taking to pawne, of all kinde of worne apparel, whether it be old or little the worse for wearinge; household stuffe and goods of whatever kind soever the same be of, findinge therebie that the same is a more idle and easier kind of trade of livinge, and that there riseth and groweth to them a more readie, more greate, more profitable advantage and gaine, than by their former manuell labours and trades did or coulde bringe them." The statute, after enumerating divers evils which were considered likely to flow from this new trade, goes on, in the fifth section, to enact that no sale or pawn of any stolen goods, to any pawnbroker in London, Westminster or Southwark, shall alter the property therein, and that pawnbrokers refusing to produce the goods to the owner from whom stolen shall forfeit double value. This law is understood to be still in force, though later statutes have rendered it less important than formerly. The first attempt at a statutory definition of the term pawnbroker is to be found in the act of 1785, imposing a stamp duty on pawnbrokers' licenses. The fifth section of the act provides "that all persons who shall receive or take, by way of pawn, pledge or exchange, of or from any person or persons whomsoever, any goods or chattels for the repayment of money lent thereon, shall respectively be deemed pawnbrokers within the intent and meaning of this act, and shall take out a license for the same accordingly (25 *Geo. III*, *ch.* 48, § 5).

In accordance with the popular fallacy at that day, that "five per cent was the natural rate of interest," the sixth section of the act "provided, always, that nothing in this act contained shall extend, or be construed to extend, to any person or persons who shall lend money upon pawn or pledge, at or under the rate of five pounds per centum per annum interest, without taking any further or greater profit for the loan or forbearance of such money lent on any pretense whatever." After the passage of the last mentioned act, several temporary statutes were enacted for the regulation of the pawnbroking business in England, of more or less importance; but the law now in force in that kingdom has been in force since the year 1800. The effect of the English statutes has been often declared by the courts, and numerous decisions are reported declaring the law in respect to pledges and pawnbrokers, some of which are applicable to the subject in this country, and will be referred to, and fully examined in subsequent pages of this work.

In France and many other countries, pawnbroking is conducted exclusively by public institutions as a *quasi* benevolent order, known as *Monts de Piété*. The first of these was established at Padua, in the present kingdom of Italy, in the fifteenth century, to supply the poor with money at a moderate rate of interest, and to control the usurious practice of the Jews, who were then the great money-lenders of Europe. At a later period these *Monts de Piété*, or pawnbrokers' offices, were introduced into many of the continental States, and some of them still exist at Paris, Madrid, Brussels, Ghent, Antwerp, etc. (*Vide Brand's Dict. of Science and Art*, art. *Monts de Piété*). The practice of these establishments has not always corresponded with their professions, but "on the whole," says Mr. McCulloch, "they have been of essential service to the poor" (*McCulloch's Commercial Dict.*, art. *Pawnbrokers*). They were suggested in a sermon preached before Pope Pius II, in consequence of various abuses which had crept into the practice of pawnbroking in the Papal States, and were established between 1464 and 1471. Attempts have been made to introduce them into England at various times, but without success. The Bank of England, by virtue of its original charter, has the power of taking pawns as security for advances; and it is said that there is among its archives some record of a golden utensil that was once taken as a pledge for an advance made to a lady of title. Any

person, however, who has had occasion to do business with the national banking establishment in Threadneedle street, London, need not be informed that the Bank of England would now consider the business of ordinary pawnbroking far beneath its notice; and yet, even now, it may be truly said that not only the Bank of England but every other bank in the world is still a pawnbroking establishment, the only difference being that the pledges there taken are bills and such like documents, instead of ordinary chattels.

As before remarked, all of the English attempts to establish these *Monts de Piété*, or Mountains of Piety, have failed of success; and yet these institutions have become quite popular in many parts of the continent of Europe. There is one in Paris, which was established by royal ordinance in 1777, and, after being destroyed by the revolution, was again opened in 1797. In 1804 it obtained a monopoly of pawnbroking in the capital. This establishment grants loans on deposits of such goods as can be preserved, to the amount of two-thirds the estimated value of all the goods, other than gold and silver, on which four-fifths of the value may be advanced. No loan is granted for less than three francs. Advances are made for a year, but the borrower has the option of renewing the engagement. Interest is charged at the rate of nine per cent per annum, with half per cent as a valuation fee. The *Mont* has generally in deposit from 600,000 to 650,000 articles, worth from 12,000,000 to 13,000,000 francs. The expense of management amounts to from sixty to sixty-five centimes per article, so that a loan of three francs never defrays the expense it occasions, and the profits are wholly drawn from those that exceed five francs (*McCulloch's Commercial Dict., art. Pawnbrokers*). And perhaps this accords with the experience of pawnbrokers in all places. Doubtless there is generally a loss on articles of small value, unless they are redeemed.

The sign of the pawnbroker in England is three golden balls, which, it is said, were the arms of the Lombard merchants, who first introduced the practice of pawnbroking in that kingdom. The popular explanation of the three golden balls is, that there are two chances to one against the redemption of the things pawned. The Lombards assumed the emblem which had been applied to St. Nicholas, as their charitable predecessor in the same line; and Mrs. Jamieson, the accomplished writer, has given another explanation of the pawnbroker's sign, which is of sufficient interest to

transcribe. The good saint, St. Nicholas, was bishop of Myra, and Mrs. Jamieson says: "Now in that city there dwelt a certain nobleman who had three daughters, and from being very rich he became poor, so poor that there remained no means of obtaining food for his daughters but by sacrificing them to an infamous life; and oftentimes it came into his mind to tell them so, but shame and sorrow held him dumb. Meantime the maidens wept continually, not knowing what to do, and not having bread to eat, and their father became more and more desperate. When Nicholas heard of this, he thought it a shame that such a thing should happen in a Christian land; therefore, one night, when the maidens were asleep, and their father alone sat watching and weeping, he took a handful of gold, and, tying it up in a handkerchief, he repaired to the dwelling of the poor man. He considered how he might bestow it without making himself known, and while he stood irresolute, the moon, coming from behind a cloud, showed him a window open; so he threw it in, and it fell at the feet of the father, who, when he found it, returned thanks, and with it he portioned his eldest daughter. The second time Nicholas provided a similar sum, and again he threw it in by night, and with it the nobleman married his second daughter. But he greatly desired to know who it was that came to his aid; therefore he determined to watch, and, when the good saint came for the third time, and prepared to throw in the third purse, he was discovered, for the nobleman seized him by the skirt of his robe, and flung himself at his feet, saying, 'Oh, Nicholas! servant of God, why seek to hide thyself?' and he kissed his feet and his hands. But Nicholas made him promise that he would tell no man" (*Sacred and Legendary Art*, vol. 2, 3d ed., p. 452).

In the engraving which accompanies the story of Mrs. Jamieson, the saint is represented standing on tiptoe, and about to throw a ball-shaped purse into the windows of the house. The nobleman is seen through an open doorway, sitting sorrowfully in the nearest room, while his three daughters are sleeping in a chamber beyond. The three purses of gold, or as they are more commonly figured, the three golden balls, disposed in exact pawnbroker-fashion, are to this day in England, the recognized and special emblem of the charitable Nicholas.

Mr. Turner, in his work on the Contract of Pawn, refers to this account of Mrs. Jamieson; but thinks that a much more common-

place explanation of the pawnbroker's sign might be given by supposing that the three balls are the representatives of the article in which the pawnbroker deals—money. He says: "In the case of most of the London trading companies, it will be found that their armorial bearings are charged with three of those objects which are the staple of that company's manufacture. Thus the goldsmiths (in addition to the leopards' heads) have three cups or chalices; the saddlers, their saddle-trees; the stationers, their books; the needlemakers, their needles, etc. In all probability the Lombards merely adopted the emblems of their traffic, and selected three 'Byzants,' a gold coin of great purity, current during the middle ages. 'Byzant' also is the world's term for a circle of gold, and thus the device would really be three golden coins on a field azure, a form in which they are commonly presented to the eye even now, whenever the pawnbroker has to depict his signs upon a flat surface, such as a window blind. As the use of flat sign-boards passed out of fashion, the original idea was preserved by the use of golden spheres, which had the advantage of being equally visible from whatever point of view the customer's eye might light upon them. We do not pretend to decide between these conflicting theories; our readers must make their election between piety and pelf, between alms-giving by a medieval bishop and money-lending by a modern broker. Still, with the liveliest appreciation of the excellence of the good saint's notions, we greatly doubt whether public interest or private morality would be secured by a general imitation of his example. His memory, however, was highly venerated, especially by the poor" (*Turner's Contract of Pawn.*, 21, 22).

Mrs. Jamieson says of the venerated saint: "While knighthood had its St. George, serfhood had its St. Nicholas. He was emphatically the saint of the people; the bourgeois saint, invoked by the powerful citizen, by the laborer who toiled for his daily bread, by the merchant who traded from shore to shore, by the mariner struggling with the stormy ocean. He was the protector of the weak against the strong, of the poor against the rich, of the captive, the prisoner, the slave. No saint in the calendar has so many churches, chapels and altars dedicated to him. In England, I suppose, there is hardly a town without one church at least bearing his name."

This is the man who is reported to be the founder of the order of

pawnbrokers, or who first established the business of pawnbroking. Mr. Turner thinks that he has no reason to be ashamed of his successors. He says: "A pawnbroker of to-day may look very prosaic by the side of a medieval saint, but no honest member of the craft is a greater public benefactor than the bishop of Myra. He lives to supply a want continually felt in civilized societies. His calling will always exist, if not under legal recognition, then in spite of legal prohibition. If it is true that to some extent it encourages habits of intemperance, it is also true that it continually relieves distress. It enables a poor man, on a small scale, to do in an hour of difficulty what the millionaire does at a commercial crisis—to raise the means of meeting a temporary purpose, by getting an advance on some portion of his property, with which he would not, under ordinary circumstances, be willing to part. As the business is, in England, left in the hands of individuals, the pawnee is naturally more anxious to make money by accommodating the pawnor than he would be if, as in France and elsewhere, the business was confined to a few establishments, conducted by government officials, with no special motive to please anybody but those above them" (*Turner's Contract of Pawn*, 22, 23).

In respect to the history of pledges or pawns in the American States, there is but little of interest recorded or to be found in the books upon the subject. The practice of pledging personal property for the security of claims dates back to the earliest settlements in the country, and the regular business of pawnbroking has been carried on nearly as long; sometimes without express sanction of statute, except as it was regulated by the charters of cities, but generally controlled by rules enforced according to the common law. The first general law in respect to pawnbroking in the State of New York was that which was incorporated into the Revised Statutes of 1830, and is the statute now in force. The revisers, in their notes in relation to this statute, say: "New. It seems necessary either to regulate the business of pawnbrokers, or to forbid its exercise. In New York, the municipal authority has the power of licensing and controlling them. Whenever that control cannot be exercised, it cannot be necessary that the business should be carried on. It is more dangerous than any private and single loans at usurious interest, because it relates to articles of small value, and thus tempts apprentices and minors to embezzle property" (3 *R. S.*, 2d ed., 562).

Most of the States at the present day have statutes regulating the business of pawnbroking, and some of them have enactments in regard to ordinary pledges, all which will be noted in their appropriate place.

Considerable of the statements contained in this chapter, giving the historical traces of pledges or pawns and pawnbroking, is compiled from Mr. Turner's English work upon the Contract of Pawn; and the whole summary is made up from data which may be considered authentic, and may be relied on as, in the main, accurate; or at least substantially correct. But people are in general more interested to understand the rights and duties pertaining to pledges or pawns, than the history of the practice in the past. Therefore, to define these rights, and indicate the extent of these liabilities, will be the object of the following chapters.

CHAPTER XXXVIII.

THE CONTRACT OF PAWNING OR PLEDGING — WHAT IS A PAWN OR PLEDGE — WHAT MAY AND WHAT MAY NOT BE PAWNED OR PLEDGED — GENERAL RULES UPON THE SUBJECT.

A SIMPLE definition of a pledge or pawn was given in the preceding chapter, but the contract of pledging or pawning should be more accurately and elaborately explained than it was in the few words there applied to the subject.

As was before intimated, in the Roman law, the contract of pledging or pawning is called *pignus*; and in that law the term was applied to mere personal property and movables, as opposed to land, and things incorporeal. Pothier says the pawn or pledge is a contract, by which a debtor gives his creditor a thing to detain as security for his debt (*créancier*), which the creditor is bound to return when the debt is paid (*De Nantissement, art. prélim., note 2*).

Judge Blackstone seems to have had a similar understanding of the contract, for he says: "If a pawnbroker receives plate or jewels, as a pledge or security for the repayment of money lent thereon at a day certain, he has them upon an express contract or condition to restore them, if the pledgee performs his part by redeeming them in due time" (2 *Black. Com.*, 452).

Chancellor Kent, in his learned Commentaries, adopting the words of Sir William Jones, says: "It is a bailment or delivery of goods by a debtor to his creditor, to be kept till the debt be discharged" (2 *Kent's Com.*, 9th ed., 777). And Judge Bouvier, in his Institutes, says: "A pawn or pledge (for the term is used as synonymous) is a contract by which the debtor, or some other person for him, delivers to his creditor, as a surety for his claim, personal property to be detained by him, which the creditor obligates himself to return to the debtor after his claim shall have been satisfied. The thing delivered by this contract to the creditor is also called a pawn or pledge, in Latin, *pignus*" (1 *Bouv. Inst.*, 419, 242).

In the prevailing opinion in a recent case decided by the Supreme Court of the State of New York, it is said: "A pledge consists of a *delivery* of goods by a debtor to his creditor, to be held until the debt or obligation is discharged, and then to be *redelivered* to the pledgor; the title not being changed during the continuance of the pledge," and reference is made to Story on Bailments for authority for the definition (*Parshall v. Eggart*, 52 *Barb. R.*, 367, 374). And in the prevailing opinion given in a case recently decided by the New York Court of Appeals, it is said: "A pledge is a delivery of goods by a debtor to his creditor, to be kept till the debt is discharged; or again, it is a bailment of personal property as security for some debt or engagement," and the judge refers to both Kent and Story for his authority (*Markham v. Jaudon*, 41 *N. Y. R.*, 235, 241).

Substantially in harmony with this is the common-law doctrine, in which a pawn or pledge is considered to be a bailment of personal property as a security for some debt or engagement. Lord Holt, in giving judgment in a case before him, mentions pawn as the fourth class of bailment, and says: "It is when goods or chattels are delivered to another as a pawn, to be security for money borrowed of him by the bailor, and this is called in Latin *vadium*, and in English a pawn or pledge" (*Coggs v. Bernard*, *Ld. Raym. R.*, 909). And a learned English text writer upon the law of contracts expresses the same idea, though more precisely, when he says: "The contract of pledge is a bailment or delivery of goods and chattels by one man to another, to be holden as a security for the payment of a debt or the performance of some engagement, and upon the express or implied understanding that the thing

deposited is to be restored to the owner as soon as the debt is discharged or the enjoyment has been forfeited" (*Addison on Contracts*, 5th ed., 298). These definitions do not at all conflict, but are substantially alike; and they all proceed on the assumption that the goods were not in the possession of the creditor before the act of pawning took place; and therefore they do not meet the case of an assignment of the debtor's goods, previously in the creditor's keeping for some other purpose; in which event, the relation of pawnor and pawnee is constituted by the mere agreement of the parties. The lexicographers, as well as the lawyers, substantially agree in their definition of a pledge or pawn. Johnson defines it as something given to pledge as security for money borrowed or promise made, and says that the verb to pawn is seldom used but of pledges given for money. Richardson's definition recognizes its more extensive application, which is, "to give or deliver; to place in the hands of; to deposit anything as gage, warranty or security; to plight or pledge; to take." Webster, the standard American lexicographer, defines a pawn as "something given or deposited as security for the payment of money borrowed; a pledge for the fulfillment of a promise;" and he defines a pledge to be "something put in pawn; that which is deposited with another as security; a pawn." Worcester, also excellent authority, defines a pawn as "something given as security for repayment of money borrowed, or for the fulfillment of a promise; a pledge; a deposit;" and his definition of a pledge is similar: "something put in pawn; something given or deposited as security for the repayment of money or the fulfillment of a promise; a deposit; a pawn; a gage." The "New American Cyclopædia" says of *pawn*: "A word undoubtedly derived from the Latin *pignus*, and meaning any article of personal property given in pledge or by way of security for the payment of a debt or the discharge of an obligation. The word is also used as a verb, and signifies to give such article in pawn or pledge." This work has nothing under the word *pledge*, doubtless for the reason that the words *pawn* and *pledge* in law are synonymous. The "English Cyclopædia," under this head, states that "pawning differs from other ways of lending and borrowing money in this: that the goods are delivered to the lender as security." As the result of the various definitions given, Mr. Turner very justly remarks: "We may say that the contract of pawn is one by which a party, either by delivery or by some act

equivalent thereto, bails personal property (other than chattels used) to the other on a security for the payment of a debt, the fulfillment of an obligation, or the discharge of an undertaking" (*Turner's Contract of Pawn*, 29).

A pledge or pawn is a bailment, for the reason that the essence of the transaction is the delivery of the thing pawned or pledged by the pawnor to the pawnee. Unless there be a *delivery* of the goods, there can be no valid pledge. The delivery must be actual and continued, except in one or two classes of cases, where constructive delivery is tolerated. But while the terms of a pledge require that there should be a delivery of the article, it is not necessary that there be an actual manual delivery. It is sufficient if there be any of those circumstances which in construction of law are deemed sufficient to pass the possession of the property. Thus, goods at sea may be passed in pledge by a transfer of muniments of title, or goods in a warehouse by the delivery of the key. "So if the pledgee has the thing already in possession, as by a deposit or loan, the very contract transfers to him, by operation of law, a virtual possession thereof, as a pledge, the moment the contract is completed" (*Story on Bail.*, § 297).

Possession may also be temporarily parted with, as between pledgor and pledgee, without destroying this relation; as where so delivered for and with an agreement for redelivering; or where it is delivered to the owner, as special bailee or agent (*Story on Bail.*, § 299). But more of this when the manner of making a pledge or pawn shall be considered.

The debtor, or person pawning or pledging, is called the pawnor or pledgor; the creditor, or he that receives the pawn or pledge, is called the pawnee or pledgee. Any person competent to contract may be a pawnor or pledgor, or a pawnee or pledgee; but there is a class of persons whose business it is to receive goods on pledge for advances of money, and they are called pawnbrokers. Their business is generally regulated by statute, and they have special rights, duties and liabilities, which do not attach to pawnees or pledgees at common law.

The contract of pawn or pledge resembles many other contracts, but still is not exactly like them. It resembles somewhat a lien; but, unlike a lien, it gives an actual though qualified property in the thing pawned or pledged to the creditor; a lien being simply a mere right in a creditor to be paid out of certain property, and

is only a privilege. It is, in many respects, like a mortgage; but, besides differing from a mortgage in its subject-matter, it does not, like a mortgage, purport absolutely to divest the debtor of his property in the thing pawned or pledged, but renders his title subordinate to, or dependent on, that of his creditor. The pawnee or pledgee gets only a special property in the thing pawned or pledged; while, in a mortgage, the title to the property passes to the mortgagee, subject to an equity of redemption. The contract of pawn or pledge differs from a *loan*, because the thing pledged is not to be used, except under special circumstances, when it is for the benefit of the owner or pawnor; while the very object of a loan of property is that it may be used. It differs from a *deposit*, because in this contract the property is delivered to the depositary to be kept for the benefit of the depositor; while, in a pledge, it is to be kept as a security for the payment of a claim. It differs from a *hypothecation*, in that a hypothecation does not require possession to accompany it; while, as has already been stated, the contract of pledge or pawn is not complete until the creditor has possession, actual or constructive, of the thing pledged. The case of bottomry bonds, and the claims for seamen's wages, are nearly similar to the hypothecation of the civil law; and they are rather liens than pledges. In all these cases there is, in some respects, a similarity; and yet the rules in regard to a pawn or pledge are, in general, much more particular and strict than in case of the other contracts mentioned, and in certain important particulars it differs from any of them (*Vide 1 Bowv. Inst.*, 420, 426).

To make a valid contract of pawn or pledge, there must be, 1st, property given in pledge; 2d, a claim to be secured; 3d, the delivery of the thing pledged; 4th, the pawnor or pledgor must enter into obligations; 5th, the pawnee or pledgee must be liable to the obligations; and, 6th, after it has been made, it may be extinguished. These are the requisites of such a transaction, as laid down by Judge Bouvier, and such, in brief, are the authorities.

It is not essential to a valid pledge that the terms of it should be in writing and a public record made of it, for the reason that in every valid pledge the creditor is found in possession of the goods; and that fact, together with the absence of possession in the debtor, is a sufficient publication of the transaction to other parties dealing with him.

With reference to what may be pawned or pledged, it may be

affirmed that, ordinarily, all goods and chattels may be the subject of a pledge, including money, debts, negotiable instruments and choses in action; and, in fact, any other valuable thing of a personal nature, such as manuscripts and patent rights, may, by the common law, be delivered in pledge. Upon this proposition, however, certain exceptions have been grafted from motives of public policy. Thus, for example, an officer in the army or navy, or other officer of government, cannot assign or pledge his future accruing pay, or other remuneration connected with the right of the government to *future* services from him, because it is contrary to the honor, dignity and interest of the State that its servants should be in danger of being reduced to poverty by anticipating their resources, which were intended to place them in a suitable condition of respectability, comfort and efficiency. And Judge Story says that this principle applies as well to the half pay of an officer in the army or navy as to the full pay. "And it has been added," he remarks, "that it might as well be contended that the salaries of the judges, which are granted to support the dignity of the State and the administration of justice, may be assigned. The fact that half pay is intended in part as a reward for past services does not, in any respect, change the application of the principle; for it is also designed to enable the party to be always in readiness to return to public service, if he shall, at any time, be required so to do" (2 *Story's Equity Jurisprudence*, § 1040, *d*). This doctrine is fully sustained by the English authorities, which are regarded as perfectly sound in our own country, and are acted upon by our courts (*Vide Flarty v. Odburn*, 3 *T. R.*, 681; *Stone v. Lidderdale*, 2 *Anst. R.*, 533; *Tunstall v. Boothby*, 10 *Sim. R.*, 540; *Greenfield v. Dean of Windsor*, 2 *Beavan's R.*, 544, 549; *Pridely v. Rose*, 3 *Meriv. R.*, 102). And Judge Story understands that the same doctrine has been applied to the compensation granted to a public officer for the reduction of his emoluments or the abolition of his office, who, by the terms of the grant, might be required to return to the public service. For, in such a case, the object of the government is to command a right to his future services, with suitable means to support him (2 *Story's Eq. Jur.*, § 1040, *d*).

"But it has been thought," says Judge Story, "that a different principle is properly applicable to pensions, either for life or during pleasure, which are granted purely for past services or as mere honorary gratuities, without any obligation to perform future ser-

vices, for it has been said that, as in such a case no future benefit is expected by the State, no public policy or interest is thwarted by allowing an assignment thereof. And this distinction has been strongly insisted upon on various occasions. But it may be fairly questioned whether the public policy, in cases of pensions, is not thereby materially thwarted and overturned. The object of every such pension is to secure to the party for his past services or honorable conduct, a decent support and maintenance during his life, or during the pleasure of the government. It is essentially designed to be for the personal comfort and dignity of the party and for the honor of the State, and to provide and encourage extraordinary exertions for the public service, on the part of all citizens or subjects. To enable the party, therefore, to assign his pension, is to defeat the very purpose of the government by enabling the assignor to have all the benefit of the bounty of the government, and to encourage, on the part of the pensioner, at once indifference and profusion, as well as to expose him to all the evils of poverty" (2 *Story's Eq. Jur.*, § 1040, *e*). Evidently, Judge Story's private opinion is adverse to the doctrine that government pensions can be assigned, although he frankly admits that the authorities seem strongly to support the right of such assignment; and if the right to government pensions, payable in the future, can be assigned by the pensioner, the same can be pledged or pawned for the security of a debt or obligation. There is very reputable authority against this right, although the weight of authority is in favor of it, and also in favor of the assignability of half pay. An important case of this description came before the English Court of Exchequer, wherein Mr. Baron Parke is reported as saying: "I concur in the opinion that this action is not maintained upon the ground that, on principles of public policy, the allowance granted to the defendant was not assignable by him. It is not necessary in this case to determine whether this is an allowance to which the defendant is entitled as a matter of indefeasible right; or whether it is payable only during pleasure, although I have a strong impression that it subsists only during the joint pleasure of the treasury and parliament, by which the fund for its payment is provided. On the other hand, even if it be payable only during pleasure, it appears to me that it is not, therefore, in point of law, the less assignable, however little its value would be in consequence of its being liable to be withdrawn

at any moment. But, viewing the matter on the ground of public policy, we are to look, not so much at the tenor of this pension, whether it is held for life or during pleasure, or whether it is, in either case, such a one as the law ought to allow to be assigned. The correct distinction made on this subject is, that a man may always assign a pension given to him entirely as a compensation for past services, whether granted to him for life or merely during the pleasure of others. In such a case the assignor acquires title to it both in equity and at law, and may recover back any sums received in respect to it by the assignor after the date of the assignment. But, when the pension is granted not exclusively for past services, but as a consideration for some continuing duty or service, although the amount of it may be influenced by the length of the service which the party has already performed, it is against the policy of the law that it should be assignable" (*Wells v. Foster*, 8 *Mees. & Wells., R.*, 149).

By the act of congress which regulates pensions to widows who had been married before the 1st of January, 1800, "any pledge, mortgage, etc., or transfer of any right, claim or interest, in any way granted by this act," is declared to be "utterly void and of no effect" (9 *U. S. Stat. at Large*, 265). Clearly by this act no part of the pension received can be pledged for any purpose whatever. But by another act of congress passed in 1853, it is provided that the widows of officers, etc., who were married subsequently to January, 1800, "shall be entitled to a pension in the same manner as those who were married before that date" (10 *U. S. Stat. at Large*, 154). The Superior Court of the city of New York has held, that by the true construction of these acts of congress, a widow, to whom a pension has been granted for the services of her husband, cannot pledge the certificate by anticipation to an agent employed to obtain the pension, to secure to him a compensation for his services; and, in fact, it was declared that such a pledge, no matter to whom made or for what purpose, is wholly void (*Payne v. Woodhull*, 6 *Duer's R.*, 169).

On the ground that the right of a pledgee cannot be consummated unless possession accompany the pledge, it has been doubted whether incorporeal things like debts, money in stocks, and the like, which cannot be manually delivered, were the proper subjects of a pledge. But there seems to be no reason why any legal or equitable interest whatever in personal property may not be

pledged; provided the interest can be put, by actual delivery or by written transfer, into the hands or within the power of the pledgee, so as to be made available to him for the satisfaction of the debt; and so the courts now hold. On this principle, debts and choses in action, and the capital stock of a corporation, and the like, are capable, by means of a written assignment, of being conveyed in pledge (*Story on Bail.*, §§ 290, 297; *Wilson v. Little*, 2 *N. Y. R.*, 443, 447).

On the principle of not encouraging litigation, assignments, by way of pawn or pledge or otherwise, which involve champerty or maintenance, or which are intended to convey only a naked right to litigate, will not be permitted. This rule, however, will not, at the present day, prohibit the pledging of personal property of any description, or the right of action which a person may have against another in scarcely any instance where the same might be pledged, provided there was no dispute in respect to the pledgee's title thereto.

Maintenance is defined by very competent authority to "signify an unlawful taking in hand, or upholding any quarrels or sides to the disturbance or hindrance of common right. This may be, where a person assists another in his pretensions to lands by taking or holding the possession of them by force or subtilty, or where a person stirs up quarrels and suits in relation to matters wherein he is in no way concerned; or it may be, where a person officiously intermeddles in a suit depending in a court of justice, and in no way belonging to him, by assisting either party with money, or otherwise, in the prosecution or defense of such suit. Where there is no contract to have a part of the thing in suit, the party so intermeddling is said to be guilty of maintenance. But if the party stipulates to have part of the thing in suit, his offense is called champerty" (1 *Russell on Crimes*, 266). And it has been judicially declared that "maintenance is, where there is an agreement, by which one party gives to a stranger the benefit of a suit, upon condition that he prosecutes it" (*Harrington v. Long*, 2 *Mylne & Keen's R.*, 592).

Judge Story intimates the opinion, that "the doctrine of maintenance and champerty, and buying pretended titles, applies only to cases where there is an adverse right claimed under an independent title, not in privity with that of the assignor or seller, and not under a disputed right, claimed in privity, or under a

trust for the assignor or seller. It is not strictly maintenance for a stranger to advance money for, or to agree to pay the costs of, a suit not yet commenced; for the offense consists in such acts done after a suit is commenced" (2 *Story's Eq. Jur.*, § 1048, note 3).

Many of the absurd doctrines of maintenance grew out of statutes which were thought necessary in a semi-barbarous age, and have been swept away by subsequent statutes, or were virtually abrogated long before the repealing enactments were passed. For example, in the State of New York, the statutory prohibition against buying a disputed title is confined to real estate which is the subject of controversy by suit, or which is not in the possession of the vendor (2 *R. S.*, 691, §§ 5, 6; 2 *Stat. at Large*, 713).

Indeed, the policy of the old law, so far as its main principle was concerned — *danger* from the influence of strong men — had already been questioned by several of the New York judges, before the revision of the statutes, as inapplicable to our social condition (*Kent, Ch.*, in *Thalhimer v. Brinkerhoff*, 3 *Cow. R.*, 644; *Marcy, J.*, in *Campbell v. Jones*, 4 *Wend. R.*, 310). It is evident from their remarks, that the ancient provisions both of the common and statute law were regarded as in great part obsolete in this country, or in the State of New York, at least; and in the argument of a case in England, near forty years ago, with all the watchful jealousy of the feudal age, its reported cases and statutes still claiming ascendancy in the tomes of Westminster Hall, unrepealed and unimpaired, an eminent sergeant (Mr. Wilde, subsequently chief justice of the Court of Common Pleas) was listened to with attention by the court, in an argument based upon similar strictures of English judges, with legal writers and precedents of the realm, that hardly a vestige even of champerty remained there (*Vide Stanley v. Jones*, 5 *Moore & Payne's R.*, 193; *S. C.*, 7 *Bing. R.*, 369). But be the English law as it may, in this country, at least in the State of New York, it would be now quite difficult to say there can be a case of maintenance beyond the purview of existing statutes on the subject.

All choses in action embracing demands which are considered as matters of property or estate, are now assignable in the State of New York, either at law or in equity, and, of course, are subjects of pawn or pledge. At the same time, agreements actually champertous, as where a stranger to the subject of the litigation, who has no interest therein in law or equity, or in expectancy, by

the ties of blood or affinity, agrees to assist in embroiling his neighbors in litigation, or in carrying their suits through the different courts after they are commenced, upon a stipulation that he shall receive a share of the fruits of the litigation as a reward for his mischievous interference, ought not to be enforced in courts of justice. A subject of litigation, under such circumstances, probably cannot be put in pledge to raise money to carry on the litigation. But any claim or demand which is the subject of an assignment may be the subject of a pawn or pledge. Personal torts which die with the party are excluded, because they cannot be assigned.

The term pawn or pledge, *ex vi termini*, excludes the idea of real estate; and where lands are given in security for a debt or obligation, the title to them must be conveyed to the creditor by a mortgage. Real estate may be mortgaged, but it cannot properly be said to be pawned or pledged.

It may be added that there are instances where the contract of pawn or pledge, in relation to ordinary chattels, is vitiated by one or both of the parties to the contract having been guilty of acts in themselves unlawful. In such cases the contract will not be enforced. And there are also instances where the contract is rendered invalid by statute, on account of the nature of its subject-matter. For example, by an act passed by the British Parliament in 1854, all persons are forbidden knowingly and willfully to bring, take in exchange, conduct or *otherwise* receive any militia arms, clothes or accoutrements, or any such articles as are generally deemed regimental necessities, according to the custom of the army, being provided for the soldier and paid for by deducting out of his pay, or any public stores or ammunition delivered for the militia, upon any account or pretense whatever (17 and 18 Vict., cap. 105). Where such statutes exist, it is unnecessary to assert that no such forbidden articles can be subject to pledge or pawn.

But, in a word, by our law all chattels, bills, choses in action, money, capital stock in corporations, and all other forms of personal property, and every valuable thing of a personal nature, such as manuscripts and patent rights, are proper subjects of pawn or pledge *as a general rule*; and where anything of this character is excluded, it is an exceptional case (*Vide Morris Canal and Banking Company v. Fisher*, 1 Stockt. R., 667).

CHAPTER XXXIX.

THE CLAIM TO BE SECURED BY A PAWN OR PLEDGE — THE DELIVERY OF THE THING PLEDGED — POSSESSION OF THE PLEDGE MUST BE CONTINUED IN THE PLEDGEE.

A PAWN or pledge will not be valid, unless given for an actual claim, either for a debt, for money, or for the performance of some engagement. The claim may be one against the pawnor or pledgor, or against any other person, but it must prove to be a valid claim. It may be actually due or to grow due in the future. The pawn or pledge may be given to secure a present or future lawful engagement, but it must be a claim that can of itself be enforced, and for a claim agreed upon at the time of the pledge.

It has been held that a pawnee has no lien on the goods pledged, nor any right to retain them for any subsequent debt of the pawnor, unless by a new agreement with him, express or implied, from the nature or circumstances of the transaction (*Elliot v. Lynch*, 2 *Leigh's R.*, 493). It has sometimes been argued that a pawnee has a right to retain the pledge, not only as security for the money lent upon it, but also for any other debt which may be due to him; and this argument has been supposed to derive support from the principles of the civil law. It is true that some passages in the books seem to countenance such an argument; but those passages, probably, may be understood to apply only to debts contracted after the pawnee's possession of the pawn, which may be presumed to have been contracted on the credit of the pawn. Certainly, the pledge cannot be retained as security for a debt *prior* to the one for which it was given to secure. Such a practice would be opposed to the principles of the common law, whatever might be said of the qualifications of the Roman law upon the subject, and it would seem to be opposed to the principles of fair dealing; for, if a debtor obtain of his creditor a loan of money on pledge, upon an express agreement that the pledge shall be restored on the repayment of the loan, the creditor cannot retain the pledge as security for a prior debt, without violating the principles of good faith. And the same principle would apply to an attempt to hold the pledge as security for a subsequent obligation, unless the circumstances were such as to induce the conclusion that such was embraced in the agreement of pledge.

Parties having a legal capacity to contract have a right to make such stipulations between themselves as they see fit, provided they do not contravene the law; and such stipulations are to be faithfully observed by the contracting parties. And the law, in such case, will never make any new contract by implication (*Vide St. John v. O'Connel*, 7 *Peters' R.*, 466). But the pledge or pawn is liable for all incidental charges and expenses appertaining to it, such as the interest on the debt secured by the pledge, or any expenses incurred in taking care of the pledge. And it has been held that the lien of the pledgee covers freight paid by him on the goods pledged (*Clark v. Dearborn*, 103 *Mass. R.*, 535). The pledge may be retained as security for these items, the same as for the original debt or obligation for which it was given to him.

It has been expressly held that a liability of the pawnee to pay another's debt is sufficient consideration for a pledge of property to secure his indemnity; and the ratio of the consideration to the value of the thing pledged is of no importance (*James v. Warren*, 12 *Mass. R.*, 300). And it has also been held that it is no valid objection by a creditor of the pawnor that the property is agreed to be held as security for further advances to be made by the pawnee, if it be also made to secure an existing debt. The only question that properly arises in such cases is the *bona fides* of the transaction (*Badlam v. Tucker*, 1 *Pick. R.*, 398; *Holbrook v. Baker*, 5 *Greenl. R.*, 309; *Conrad v. Atlantic Ins. Co.*, 1 *Pet. R.*, 448).

A late case before the Supreme Court of the State of New York illustrates the doctrine under consideration. A party agreed to sell to another a parcel of land clear and free of encumbrances, except a certain mortgage, and take his pay in ready-made clothing. When the vendor executed the conveyance of the land, it appeared that there were taxes to the amount of \$278.24, which were a lien on the property; and it was stipulated that the vendee should retain \$650 worth of the clothing, at the invoice price, upon the condition that, if the vendor should pay the taxes within one month from that time, the vendee should deliver to him the clothing; but, if the taxes were not paid within that time, then the vendee should have the right to pay the taxes, and appropriate the clothing to his own use. The court held that the facts did not present the case of a pledge; it being the essence of such a contract that the thing should be delivered as a security for some *debt* or *engagement*; and that it not appearing that the taxes were assessed

against the vendor of the land, or that he was in any manner *liable for the payment thereof*, there was no engagement of the vendor to which the clothing could attach as a pledge (*Hale v. Hays*, 48 Barb. R., 574). The thing must be delivered as security for some debt or engagement, in order to constitute a valid pledge.

Another of the essential qualities of the contract of pledge is, that the property pledged be actually delivered to the pledgee. In the old books they took the nature of a pledge to be, that it ought to be delivered at the same time that the money was lent or obligation incurred; and if the goods were not delivered at the same time, in security of the money, they did not plead it as a pledge, but in the nature of a license, to excuse the trespass. But this doctrine has long since been exploded; as a pledge given to redeem an antecedent debt or obligation still existing is just as valid as though given for a debt or obligation contracted at the time of the pledge. Nevertheless, until the thing pledged is actually delivered to the pledgee, he acquires no right or property in it. A pawn is not contracted by a bare promise, but by something done; although it appears that a hypothecation may be contracted by a *nude pact*, or the assurance of the thing to be delivered hereafter. But not so of a pawn or pledge. Delivery is the essence of this contract. On this principle the English Court of King's Bench decided, in a case before it, where the question was whether an assignment of the freight and earnings of a ship, by way of pledge, and subject to a proviso for a reconveyance, extended to profits not in actual or potential existence at the time of the assignment. And although the deed of assignment expressly mentioned "all the freight and earnings then due or thereafter to become due," Lord Ellenborough gave judgment against the defendants, who claimed under the deed, because at the time the deed was made the oil from which the earnings were to arise had no existence, actual or potential (*Robinson v. Macdonald*, 5 Maule & Selw. R., 228). And "upon this principle an assignment of sheep which the lessee was to deliver to the assignor at the end of the lessee's term, or of the wool which should grow upon such sheep as the assignor should thereafter buy, have been held inoperative, because the assignor had not at the time of the assignment that which he was professing to assign, either actually or potentially, but in possibility only" (*Wood and Foster's case*, 1 Leon. R., 42; *Grantham v. Hawley*, Hob. R., 132). This doctrine, perhaps, should be understood in a modified

form, as may appear hereafter. It was remarked in an early English case: "Delivery is of the essence of an English pawn; and though according to Roman law the rule is different, yet other countries adopting the Roman law have corrected this, that if a pawn be not delivered, it shall not affect a purchaser for valuable consideration" (*Ryell v. Rolle*, 1 *Atk. R.*, 167). It is undoubtedly true that a pawn is complete by delivery, but a sale is complete by contract. The delivery of a pledge may be actual or constructive. It need not be an actual manual delivery of the thing itself. It is sufficient if it passes the *indicia* of ownership. Thus in the case of a ship, the delivering over of the muniments of title is a delivery of the ship; and goods at sea may be passed in pledge by a transfer of the muniments of title, as by a written assignment of the bill of lading. This is equivalent to actual possession, because it is a delivery of the means of obtaining possession. It has been held that goods in a warehouse may be pledged, and that the delivery of the keys of the warehouse is a delivery of the goods in it (*Ryell v. Rolle*, *supra*).

The New York Court of Appeals declared, at an early day, that possession of the property is essential to the existence of a pledge; but that the possession may be according to the nature of the subject. And it was held that, where the property is not capable of manual delivery and possession, for example, shares of stock in an incorporated company, a pledge may be created by a written transfer thereof; and it was said that the transaction may be a pledge instead of a mortgage, although the *legal title* passes to the creditor; that the transfer of the legal title is not in any case inconsistent with a pledge, if the debtor has a right to the restoration of the property, on payment of the debt at any time, although after it falls due.

Ruggles, J., delivered the opinion of the court, and on this point said: "The capital stock of a corporate company is not capable of manual delivery. The scrip or certificate may be delivered, but that of itself does not carry with it the stockholders' interest in the corporate funds. Nor does it necessarily put that interest under the control of the pledgee. The mode in which the capital stock of a corporation is transferred usually depends on its by-laws (1 *R. S.*, 600, § 1). It is so in the case of the New York and Erie Railroad Company (*Laws of 1832, ch. 224, § 18*). The case does not show what the by-laws of that corporation

were. It may be that nothing short of the transfer of the title on the book of the company would have been sufficient to give the defendants the absolute possession of the stock, and to secure them against a transfer to some other person. In such case the transfer of the legal title being necessary to the change of possession, is entirely consistent with the pledge of goods. Indeed, it is in no case inconsistent with it if it appears by the terms of the contract that the debtor has a legal right to the restoration of the pledge on payment of the debt at any time, although after it falls due, and before the creditor has exercised the power of sale" (*Wilson v. Little*, 2 *N. Y. R.*, 443, 447). Upon this last proposition the learned judge cited a case decided by the English courts, in which the debtor "made over" to the creditor "as his property" "a chronometer, until a debt of fifty pounds should be repaid; and it was held that it was a valid pledge (*Reeves v. Cappen*, 5 *Bing. N. C.*, 142).

The Supreme Court of California recently declared that, in a pledge of chattels, mere delivery of the chattel is usually enough to vest in the pledgee the special property requisite to sustain the pledge. But that incorporeal property, being incapable of manual delivery, cannot be pledged without a written transfer of the title. Debts, negotiable instruments, stocks in incorporated companies, and choses in action generally are pledged in that mode. Such transfer of the title performs the same office that the delivery of possession does in a case of a pledge of corporeal property. The transfer of the title to them, like the ordinary possession of chattels, constitutes the evidence of the pledgee's right of property in the thing pledged. Thus the transfer in writing of shares of stock not only does not prove that the transaction is not a pledge, but the stock, unless it is expressly made assignable by the delivery of the certificate, cannot be pledged in any other manner (*Brewster v. Hartley*, 37 *Cal. R.*, 15).

But the rule is well settled and universally recognized, that in case of chattels, delivery or transfer of custody is absolutely necessary to constitute a pawn or pledge (*Thompson v. Andrews*; 8 *Jones' Law R.*, 453; *First, etc., Bank v. Nelson*, 38 *Ga. R.*, 391). It has been held, however, by the Court of Appeals of the State of Kentucky, that the deposit of bills of lading for cotton with a bank, without assignment or other writing, and without actual delivery of the cotton, is a sufficient transfer to pledge the

cotton to the bank as security for the payment of money advanced upon the faith of the security so given, and that the lien acquired by the bank is paramount to a subsequent attachment lien (*Petill v. First, etc., Bank*, 4 *Bush's R.*, 334).

If the pledgee has the property in his possession at the time of the contract, by way of deposit or otherwise, the contract of pledge transfers to him a virtual possession of the thing, as a pledge, the moment the contract is consummated. This principle is elementary, and has also been recently recognized in a case in the New York Court of Appeals. The Broadway Bank held certain stocks belonging to one Champlin as collateral security for certain liabilities of Champlin to the bank. While the bank had possession of the stocks, Champlin left with the bank a draft on a man by the name of Wood for \$3,000 for collection. Subsequently Champlin applied to the bank to have the proceeds of the draft, which was then unaccepted, passed to his credit as a discount. This the bank declined to do, as the draft was one-name paper, unless it had collateral security. This conversation occurred between the president of the bank and Champlin. Champlin asked the president if the bank had heard of anything from the draft on Wood. The president answered, "no." Champlin then said, "I must have the proceeds of that draft to-day, or I shall go to protest for the first time." He then said: "You hold all my stocks; they are security for any discounts and this draft." The president of the bank then replied: "If that is so, we will put the proceeds of the draft to your credit." And thereupon the bank advanced to, and put to the credit of Champlin, the proceeds of the draft, that is, the amount of it, less the discount. The question for the court was, whether or not this constituted an additional pledge of the stocks beyond the hypothecation of those previously made; and the court held that it did; that it was a good pledge of the stocks as security (*Van Blascom v. Broadway Bank*, 37 *N. Y. R.*, 540; and *vide Brown v. Warren*, 43 *N. H. R.*, 430).

A case was decided by the Supreme Judicial Court of Massachusetts several years ago, wherein it appeared that a brickmaker stipulated with the lessees of the brickyard that they should retain the bricks to be made, as security for their advances to the brickmaker. The court held that the bricks became pledged as fast as they were manufactured.

Putnam, J., delivered the opinion of the court, and on this

point said: "It was an agreement for the pledging of the bricks as they should be made. It is true that, where property is to be thereafter acquired, it is not strictly and technically a pledge; it is rather an hypothecation; but where the title is acquired *in futuro*, the right of the pledgee attaches immediately upon it. * * *

Now, we hold it to be clear that the plaintiffs had a right to retain Evan's part of the bricks under this contract. It was expressly agreed by Evans that they should have such a right. Without such a right it is not to be supposed that the plaintiffs would have made the great advances which were necessary to enable Evans, to make the bricks. Every brick as it was formed may well be considered as delivered to the plaintiffs in part execution of the contract. The whole were put into kilns and burnt in the plaintiffs' yard; for, as the assignees of the lessees, they legally held the yard in their possession during the term. It was their land, *pro hac vice*, as much as it would have been if it had been held by them in fee simple. And thus the property remained when the defendant attached it" (*Macomber v. Parker*, 14 *Pick. R.*, 497, 505, 506). This case came under review before the same learned court several years after it was decided, when it was neither sanctioned nor disapproved; but it was held that the doctrine of the case did not apply to that of a mortgage.

Wilde, J., who delivered the opinion of the court, after stating the facts of the case of *Macomber v. Parker*, said: "This, unquestionably, was a good assignment, upon the principles already stated. Hunting & Lawrence not only had a potential possession, but they owned the clay of which the bricks were to be made, subject only to the rights which Evans might afterward acquire by his contract. The transmutation of the clay into bricks did not change the right of property; so that Evans could not acquire an absolute legal title to his share of the bricks until he paid the balance due to the plaintiffs. Upon this view of the case, the question as to the right which might be acquired by the pledging or hypothecation of property was not material to the decision of the case. But if it were otherwise, the doctrine laid down by the learned judge who delivered the opinion of the court in that case is not applicable to the present case. For if, when a party agrees to pledge property afterward to be acquired, and, when it is acquired, delivers over the same to the pledgee, the right of the pledgee would then attach, it does not follow that the same doctrine would apply to a

mortgage or sale. A mortgage is an executed contract, and it is clear that nothing passed by the mortgage deed in this case besides the stock in trade which the mortgagor had at the time the mortgage was executed" (*Jones v. Richardson*, 10 *Met. R.*, 481, 490).

In a somewhat recent case before the Supreme Court of the State of Illinois, where A. and B. cultivated a farm jointly, A. furnishing a horse, harness, etc., and B. a horse, for their joint use, and B., who had pledged his horse to A., on being arrested on a criminal charge, told A. to take his horse home, that he, B., would be back in a few days, and A. did so, afterward using and claiming the horse as his own, it was held a sufficient delivery from B. to A. to enable the latter to keep the horse as against other creditors of B. (*Parsons v. Overmire*, 22 *Ill. R.*, 58).

Upon this point, the elementary writers use the following language: "Not only goods in present possession, but even goods in reversion, are comprehended under a general pawn or hypothecue, as corn in the ground, a ship to be built with the timber pledged, if there be a clause inserted to comprehend it. * * * An hypothecue may be an assurance of a thing to be delivered hereafter" (*Ayliff, Civ. Law*, book 4, tit. 18, pp. 525, 530, 542).

In *Montagu on Liens*, it is said, that "it is usual to speak of *lien by contract*, though that is more in the nature of an *agreement for a pledge*. Taken either way, however, the question always is, whether there be a right to detain the goods till a given demand shall be satisfied," citing *Gladstone v. Birley*, 2 *Meriv. R.*, 404. (*Montagu on Liens*, 36, note c.)

Judge Story says: "By the Roman law, not only property of which the party was at the time in possession, or to which the party was at the time entitled to possession, or to which he had then a present title, might be pledged, but also property of which he had neither a present possession nor a present title, and which might be acquired by him only *in futuro*, and when the title was so acquired *in futuro*, the right of the pledgee attached immediately upon it. But in such cases it was more properly an hypothecation than a pledge. In our law, a pledge is strictly confined to property of which there may be a present possession and title, or in which there is a present vested right or interest. But although, by the common law, there cannot be a technical pledge of property not then in existence, or to be acquired *in futuro*, yet there may be a contract for an hypothecation thereof; and when

the title is acquired, or the property comes into existence, the right of the pledgee will immediately attach to it" (*Story on Bailm.*, § 294). The learned author also refers to the case of *Macomber v. Parker* (14 *Pick. R.*, 297) in the same section, and states the law to be as therein declared; but in a note says: "It is not easy to reconcile the doctrines of this case, in some of its bearings, with that of *Bonsey v. Aunce* (8 *Pick. R.*, 236)."

A very important and well-considered case, involving the question of the sufficiency of a delivery in case of pledge, was recently decided by the New York Court of Appeals. It appeared that the defendants, stock brokers, at the request of the plaintiff, and for him, but in their own names and with their own funds, purchased certain stocks, the plaintiff depositing with them a "margin" of ten per cent, which was to be "kept good," and they "carrying" the stocks for him. The court held that the legal relation between the parties by this transaction was necessarily that of pledgor and pledgees, the stock purchased being the property of the plaintiff, and, in effect, pledged to the defendants as security for the repayment of the advances made by them in the purchase.

Hunt, Ch. J., who delivered the prevailing opinion of the court, on this point said: "While it is true that the dealer, in the present case, never had actual possession of the property which he claims to have pledged, he had it sufficiently to bring his case within the principles of the law of pledge. The substance of the first branch of the transaction is this: The plaintiff calls upon the defendants, who are brokers, to purchase for him certain shares of railroad stock, and furnish him with \$1,000 for that purpose, agreeing to pay interest on advances he shall make in the purchase, and commissions. The defendants made the purchase, having themselves advanced ninety per cent of the purchase-money. They bring to the plaintiff the certificates of the stock thus purchased by him and for him, and deliver them to him, as the owner thereof. He thereupon hands them back to the defendants, to hold as security for their advances on the purchase, with interest and commissions. If these precise forms had been used, no one would deny that the redelivery of the certificates would have constituted a strict, formal pledge. In my opinion, the transaction, as it took place, amounted to the same thing. To have delivered the certificates to the plaintiff, and that the plaintiff should then have returned them to the defendants, to be held by them as security for the advance in their

purchase, would leave the parties in precisely the same relation as if the defendants had retained them for that purpose; the form of a delivery to the plaintiff, and a redelivery by him to the defendants, being waived by agreement of the parties. It comes fully within the principle I have already quoted from Story on Bailments, that, where the pledgee has the thing in his possession, the contract of pledge operates as a delivery the moment the contract is completed (*Story Bail.*, § 297). The certificates are appropriated as security for an engagement, to wit, the payment of the advance, with interest and commissions. The possession and the delivery are complete, in the abbreviated manner I have described."

Two of the judges dissented from the conclusion to which the court came in the case, and wrote elaborate opinions, arguing that the legal effect of the contract between the parties was not to create the relation of pledgor and pledgee, but, on the contrary, that the transaction was an executory agreement for a pure speculation in the rise and fall of stock, which the broker, on condition of perfect indemnity against loss, agreed to carry through in his own name and on his own means of credit, accounting to his customer for the profits, if any, and holding him responsible for the loss; and that the title to the stocks was never, in any sense, in the supposed pledgor. But five of the judges concurred with the chief judge in his views of the legal relations of the parties in the transaction, and in the final disposition of the case in pursuance of those views (*Markham v. Jaudon*, 41 *N. Y. R.*, 235, 241, 242, 246-258).

The discussion of the question of pawns or pledges, in the last two cases considered, was important, in order to determine the rights of the parties, which depended much upon the decision of the question. The distinction between a pledge and some other securities has not been regarded as of much moment, nor has it often been sharply defined; but it is, in frequent cases, of great importance. It is of every day's occurrence to give personal property, and especially choses in action, as promissory notes and stocks in incorporated companies, to secure loans of money or debts. This may be regarded as a mortgage or as a pledge, according to the contract of the parties; but the rights and obligations of the parties are quite different in the one case from the other. The reason is, that, in the case of a pledge, the property passes at once into the possession of the pledgee; while, in the other case, the property may remain in the possession of the mortgagor. Hence,

the matter of possession is oftentimes very important, in order to determine the question whether the transaction is a pledge or otherwise, for the purpose of ascertaining the legal rights and obligations of the parties. A pledge and a mortgage are securities of a similar nature, and, when applicable, the same rules will be applied in the interests of creditors; but, as between themselves, very different rules are applied. What is sufficient evidence in the case of a pledge, may be gathered from a recent case before the Supreme Court of the State of New York. One Roche, a produce forwarding and commission merchant, on applying to the plaintiffs to discount his promissory note, attached to such note, as collateral, a paper or receipt, signed by him, as follows:

“Received in store, for account of Messrs. Parshall & Shanzlin, subject to their order, the following named property, as security to my note, given this day, for fourteen hundred and eighty dollars, for twenty days from date,

55 tons fine middlings, @ \$24.....	\$1,320 00
10 “ bran, @ \$20	200 00

\$1,520 00

(Signed)

JOHN ROCHE.”

Roche then informed Parshall, one of the plaintiffs, that the property was in his warehouse. This was all that was said or done concerning the property named in the receipt, at that time; and this was at the banking house of the plaintiffs. The plaintiffs received the note and receipt from Roche, and advanced him the avails of the note. The day before the note matured Roche absconded, and the day it did mature, between three and four o'clock in the afternoon, one of the plaintiffs went to the store of Roche and found it in possession of Roche's clerk. He looked over the store, and then showed the receipt to the clerk, saying: “There is the paper that shows our right.” Thereupon the clerk handed him the keys to the store. He locked up the store, taking the keys away with him, and about six o'clock the sheriff went to the store, found it locked, got a smith to open it, went in and made a levy, by virtue of an attachment against Roche, on all the goods in the store, among which was a part of the bran and middlings mentioned in the receipt. The question for the court was as between the plaintiffs and the sheriff, as to the effect of the transaction,

The court held: 1. That the receipt was not a *chattel mortgage*. 2. That the transaction, in its legal effect, did not constitute a *pledge*, the subject thereof not having been delivered; and that, although the plaintiffs had, in a lawful manner, before a levy made thereon under the attachment, obtained the actual possession of the property, they were not entitled to the right and protection of *bona fide* pledgees; and, 3. That the possession of the storehouse, gained by the plaintiffs, with the consent of Roche shortly before the property was levied on under such attachment, did not constitute a good delivery, as against the attaching creditor.

Barker, J., delivered the opinion of the court, and said: "The plaintiffs insist that it is an instrument in the nature of a mortgage, and if it is not that, then it is a pledge valid in law. * * * It is not a chattel mortgage; it contains no words of sale. * * * The next proposition presented and urged by the plaintiffs' counsel is that the transaction, in its legal effect, constituted a pledge, and that the plaintiffs having in a lawful manner secured the actual possession, prior to the sheriff's levy by attachment, they are entitled to all the rights and protection of a *bona fide* pledgee. All there is in the plaintiffs' case, upon which an argument can be based, is in this precise point. * * * In this case there was not at the time of making the agreement, on the 13th of December, any manual or constructive delivery of the goods sought to be held as a pledge. The goods remaining in the very place where the owner stored and kept them, not even being viewed by the pledgee, and Roche continued to keep open the store and transact business, as he did before the pledge, there can be no pretense that there was a symbolical delivery. If he had closed up the store and handed over the keys to the plaintiffs, there would have been such a delivery. * * * Did the possession of the storehouse, gained by the plaintiffs one hour before the levy, constitute a good delivery as against the creditors? I think not. And hence I assume that they got possession of the storehouse with the assent of Roche. * * * I think the reasons for holding that delay in filing a chattel mortgage makes it absolutely void as against creditors, though filed before judgment and execution, are applicable to a case of non-delivery of goods pledged, and refer to authorities hereinbefore cited on that point. A pledge and a mortgage are securities of a similar nature, and, where applicable, the same rules should be applied. No

class of securities known to the law can be so much and so easily used in creating and keeping on foot secret and fraudulent agreements, if it be tolerated that a pledgee, as against the creditors of the pledgor, can delay the taking of possession of the subject of the pledge until the same be procured by creditors with legal process. The interests of trade require that there should be an actual and continued change of possession of the goods, and such is the law" (*Parshall v. Eggart*, 52 Barb. R., 369, 371, 372, 374-376).

It will be observed that the transaction in this case was held not to amount to a pledge *as to the creditors of the pledgor*; not but that it might be a valid pledge as between the original parties to it. Doubtless, as to them, the transaction would be held to be a valid pledge from the moment the pledgee got possession of the property by the consent of the pledgor. The reasons for the strictness of the rule in regard to delivery do not apply with the same force as between the original parties to the transaction, as between the creditors of the pledgor and the pledgee. The delivery need not be to the pawnee himself; a mere formal and temporary possession in the hands of a third person on the pawnee's account has been held to be a substantial compliance with the rule, and deemed sufficient. But the possession must be actually changed from the pawnor to the pawnee, or to some third person on his account.

Delivery and possession are essential to a pledge, but the delivery may be symbolical, and the possession according to the nature of the thing pledged. And such delivery will be good as against a subsequent foreclosure (*Nivan v. Roup*, 8 Clarke's [Iowa] R., 207).

Although the pledge will not be complete until delivery of the thing pledged, yet it is not requisite that the delivery be simultaneous with the agreement to pledge, or the incurring of the obligation for which the pledge is given to secure. That is to say, the money for which the pledge is made to secure, may be received by the pledgor one day and the contract of pledge be completed on the next, although there are some English decisions which would seem to indicate a different position. But, in the language of one of the judges of the New York Court of Appeals "to say, in such a case, that the advance is made on the faith of the promise to pledge, and not on the faith of the pledge, is a nicety of refining, far too nice for the ordinary, common-sense dealings of business men" (*Cartwright v. Wilmerding*, 24 N. Y. R., 521, 533, 534).

Undoubtedly, if the time between the loan and taking possession of the property agreed to be pledged for its security be such as to throw doubt on the transaction, such as with connecting circumstances to excite suspicions that the advance was really a loan without security, and the pledging the goods an after-thought, then the transaction is not within the protection of the law relating to pledges. But, in the language of the same learned judge already quoted, "it surely will not do to hold, as a rule of law, that a man on receiving the money cannot go around the corner to sign an order for the delivery of the goods, without changing the nature of his contract and depriving the delivery of its agreed character of a pledge."

In the State of Massachusetts, manufacturers of cloth agreed to give A. security for a debt, and for that purpose authorized one of their workmen to select and hold a number of pieces of cloth for the use of A. The workman afterward, at A.'s instance, selected and removed the cloths to another room in the factory, and gave notice to the manufacturers and to others. The court held that this was a valid pledge (*Sumner v. Hamlet*, 12 *Pick. R.*, 76).

The delivery must be actual or constructive and continued; and under ordinary circumstances the redelivery of the thing pledged to the pawnor by the pawnee terminates the contract, and the pawnee loses his lien upon the property, though his claim or debt may continue against the pledgor. This is the general rule; still, if the thing pledged be delivered back to the owner for a temporary purpose only, with an agreement to redeliver, the pawnee may recover it on the owner's refusing to restore it (*Roberts v. Wyatt*, 2 *Taunt. R.*, 268).

Where a captain had pledged his nautical instruments with the defendants, who afterward redelivered them to him under a written agreement that he might have the use of them for the voyage upon which he was then starting, the captain afterward pledged the instruments with the plaintiff. On the trial of an interpleader issue, the Court of Common Pleas, of England, gave judgment for the defendants.

Tindall, C. J., in his opinion, said: "We agree entirely with the doctrine laid down in *Ryall v. Rolle* (1 *Atk.*, 165), that, in the case of a simple pawn of a personal chattel, if the creditor parts with the possession he loses his property in the pledge; but we think the delivery of the chronometer to Wilson, under the terms

of the agreement itself, was not a parting with the possession, but that the possession of Captain Wilson was still the possession of Messrs Capper. The terms of the agreement were that 'they would allow him the use of it for the voyage,' words that gave him no interest in the chronometer, but only a license or permission to use it for a limited time, whilst he continued as their servant and employed it for the purpose of navigating their ship. During the continuance of the voyage, and when the voyage terminated, the possession of Captain Wilson was the possession of Messrs. Capper, just as the possession of plate by a butler is the possession of the master; and the delivery over to the plaintiff was, as between Captain Wilson and the defendants, a wrongful act, just as the delivery over of the plate of the butler to a stranger would have been, and could give no more right to the bailee than Captain Wilson had himself" (*Reeves v. Capper*, 5 *Bing. N. C.*, 136; *S. C.*, 6 *Scott's R.*, 877; *S. C.*, 35 *Eng. Ch. R.*, 54, 56). There was no question of fraud made on the trial of this case, and the case seems to have been decided upon the same principles as though the litigation had been between the original parties. Upon argument before the court, in banc, it was contended that the transaction between Wilson and defendants was a mere pledge of the chronometer as a security for the repayment of the money advanced; and that, by redelivering the instrument to Wilson, the defendants lost their lien, and were left to their action on the agreement. But the court were of the opinion that the facts did not bring the case within the principle that when the party to whom a personal chattel is pledged parts with the possession of it, he loses all right to his pledge. The case is important as indicating what may be regarded as possession of property by the pledgee under his contract of pledge. The rule is undoubted, as settled by all the authorities, that if the pawnee, except conditionally, parts with the possession of the pawn or pledge, he loses the benefit of his security; and the case of *Reeves v. Capper* was not designed to conflict with this doctrine. By the common law, however, the pawnee may deliver the pawn into the hands of a stranger, without consideration, for safe custody, or indeed convey the same interest conditionally by way of pawn to another person, without destroying or invalidating his guaranty.

Where the pledgee of an omnibus delivered back the possession to the owner for a temporary purpose only, and after the accom-

plishment thereof the property was returned to him, and the pledgor subsequently, and while the property was in the possession of the pledgee, mortgaged it to a third person, the Supreme Court of Illinois held that the mortgage lien thus acquired was subordinate to the title to the pledgee (*Cooper v. Ray*, 47 Ill. R., 53).

The Supreme Court of Maine lately held that in order that a pledgee may be able to keep good his security as a pledge, he must retain possession of the property. If he permits it to go back into the hands of the pledgor, and he sells it, the court holds that the vendee will acquire a good title thereto (*Day v. Swift*, 48 Maine R., 368). And the same court held, in a much earlier case, that a delivery of personal property for security is not a transfer on condition, and does not constitute a mortgage thereof, but a pledge merely; and that if the pledgee voluntarily relinquishes the possession of the property to the pledgor and does not regain it, his right thereto against third persons ceases (*Eastman v. Avery*, 10 Shep. R., 248). And the same court reiterated the same doctrine at a later date, holding that a pledge is not perfect unless the chattel be delivered, nor does it subsist any longer than possession be retained by the pledgee (*Beeman v. Lawton*, 37 Maine R., 543).

The Supreme Court of North Carolina has frequently decided that property delivered as a pledge to secure a debt, and redelivered by the pawnee to the pawnor, is liable to be seized and sold under execution against the pawnor, or sold by him, and a good title passes (*Barrett v. Cole*, 4 Jones' Law R., 40; *Smith v. Sasser*, Ib., 43). The same court has gone so far as to decide that by giving up the thing pawned to the pawnor, though for a special purpose, the pawnee loses his lien, as between himself and the pawnor (*Bodenhamner v. Newson*, 5 Jones' Law R., 107).

The Supreme Court of New Hampshire has decided that possession is essential, not only to the creation, but also to the continuance of the lien created by a pledge, and that such lien will be forfeited by a voluntary delivery of the property to the pledgee. It was held, however, that possession and control of the property by the *wrongful* act of the pledgor, without the assent of the pledgee, will not create a forfeiture of the lien, nor defeat his right of action to recover damages for an injury to, or a conversion of, the pledge (*Walcott v. Keith*, 2 Foster's R., 196).

The Supreme Court of Tennessee has held that a lien on a pledge may be waived by voluntary surrender of the pledge with

intent to abandon the lien, or by agreeing that it may be attached at the suit of a third person, but not by the pledgee's attachment to be made on the property pledged to enforce his lien and as a mode of sale (*Arendale v. Morgan*, 5 *Sneed's R.*, 703).

The doctrine of the Superior Court of the city of New York, as laid down over twenty years ago, when the bench of that court was graced by as able judges as ever sat upon any bench, would seem to be decisive upon this subject. The court held, in conformity with the general rule, that the essence of the contract of pledge is that there shall be an actual delivery of the thing to the pledgee, and the common-law rule was recognized that as a general proposition the positive delivery back of the possession of the thing with the consent of the pledgee terminates his title. But the court decided that the delivery of the pledge to the pledgor, for a temporary purpose, as agent or special bailee for the pledgee, does not impair the title or possession of the latter, as between the parties, nor even as to third persons. (*Hays v. Riddle*, 1 *Sandf. R.*, 248; and *vide Jones v. Baldwin*, 12 *Pick. R.*, 316). This, doubtless, is a correct view of the question, and may be regarded as of quite general application. The subject may be touched upon incidentally in a subsequent chapter.

CHAPTER XL.

THE PERSON OF THE PAWNOR OR PLEDGOR — THE POWER OF MINORS, MARRIED WOMEN, FACTORS AND OTHER AGENTS TO MAKE A PLEDGE OR PAWN.

It has been intimated in a previous chapter that any person, having a general capacity to contract, may enter into the engagement in respect to a pawn or pledge. Persons under disabilities are affected by the lack of capacity in this as in other cases of contract. Lunatics, and *non compos mentis* from age, debility or otherwise, are wholly unable to make a valid pledge or receive one. Minors are not entirely disqualified from making contracts; they are sometimes absolutely bound by their contracts, but their contracts are generally voidable, and probably this would be the rule in all cases in respect to pledges or pawns, but their voidable contracts are only to be avoided upon their own election.

At the common law, married women are incapable of making or receiving a pledge, as they may not enter into a personal obligation of any kind. But by the statutes of many of the States, *femes covert* are made capable of binding themselves by contract in certain cases, and disposing of their personal property; and in these cases they are qualified to make or receive a pledge the same as a *feme sole*. In respect to pledges by persons under legal age, they may be affirmed or disaffirmed in the same manner and under the same circumstances that the contracts of infants for the sale of their chattels may be affirmed or avoided. Perhaps there is nothing peculiar in this contract to make it an exception to the general rule.

Persons incompetent to enter into the contract for themselves (as infants and married women), may be agents for others, provided they have the maturity and mental qualifications to enable them to do business of this nature. A married woman may act as the agent of her husband, and as such, with his consent, bind him by her contract or other act; or she may act as the agent of another in a contract with her own husband, although it is not clear that she can act as the agent of a third person against the express dissent of her husband (*Story on Agency*, § 7). But a married woman or minor, capable of doing business as an agent in other matters, may act as the agent of another in the matter of a pledge.

A person *non compos mentis*, who is, nevertheless, apparently of sound mind, and not known by the other contracting party to be otherwise, if he enters into a contract for the purchase or pawn of property, which is fair and *bona fide*, and which is executed and completed; and the property, the subject-matter of the contract, has been paid for and fully enjoyed, and cannot be restored so as to put the parties in *statu quo*, such contract cannot afterward be set aside (*Molton v. Camroux*, 4 *Ex. R.*, 17).

There may be cases in which the pawnee will lose his right to the pawn or pledge, even though the pawnor be a person under no disability. An instance of this kind was supposed to be where it was held that a factor or agent who *pledged* the goods of his principal, must, *prima facie*, be taken to have acted in excess of his authority, and, therefore, the principal was held not bound by his agent's acts, unless the pledging was made under the *express* authority of the principal. The usual employment of a factor being to

sell, it has been repeatedly held that he cannot *pledge* the goods intrusted to him; and that the mere circumstance of a principal drawing bills on his factor, to whom goods were consigned, to be provided for out of the proceeds of such goods, would not authorize the factor to pledge them for the purpose of raising money to meet such bills. On this ground, where a factor had become bankrupt, and a person to whom he had pawned goods sold them, the principal recovered the entire proceeds of the sale in an action for money had and received, though the factor had appropriated part of the money advanced by the pawnee or pledgee to the payment of one of the bills drawn by the principal or his agent, the pawnor. There are several English cases holding this doctrine, although it was observed by Lord Ellenborough, in the decision of one case, that it was a hard doctrine when the pawnee was told that the pledgor of the goods had no authority to pledge them, being a mere factor for sale, and yet he declared that, since the case of *Paterson v. Task*, that doctrine has never been overturned (*Pickering v. Bush*, 15 *East's R.*, 38). A factor, though clothed with an apparent ownership of the goods, has no power to pledge the property consigned to him for sale. And this rule has been applied even where advances had been made on a bill of lading in the factor's favor, by a person who did not know that he was not the owner of the goods.

Where goods were consigned on the *joint account* of the consignors and consignee, and a bill of lading was sent to deliver the goods to the consignee or his assigns, who afterward indorsed and delivered the bill of lading to the defendants, upon condition of their making an advance to them on it, which they failed to do, but claimed to retain it as a security for prior advances, the English Court of King's Bench held that such indorsement and delivery of the bill of lading did not divest the consignor's right to stop the goods *in transitu*, upon the insolvency of the consignee, who had not paid for them. And the doctrine was declared that a *factor* cannot *pledge* the goods of his principal by indorsement and delivery of the *bill of lading*, any more than by the delivery of the goods themselves, though the indorsers knew not that he was factor.

Lord Ellenborough, C. J., in his opinion, said: "Now, this was a direct *pledge* of the bill of lading, and not intended by the parties as a *sale*. A bill of lading, indeed, shall pass the property

upon a *bona fide* indorsement and delivery, where it is intended so to operate, in the same manner as a direct delivery of the goods themselves would do, if so intended. But it cannot operate further. Now, if the factor had been in possession of the goods themselves, and had purported to sell them to the defendants *bona fide*, the property would have passed by the delivery; but not if he had meant to *pledge them*, because it is beyond the scope of a factor's authority to *pledge* the goods of his principal. The *symbol*, then, shall not have a greater operation to enable him to defraud his principal than the actual possession of that which it represents. The principal who trusts his factor with the power to sell absolutely shall so far be bound by his act; but the defendants shall not extend the factor's act beyond what was intended at the time; and here only a pledge was intended, which he had no authority to make."

Grose, J., said: "It is admitted that a factor cannot *pledge* the goods of his principal by delivery of the goods themselves; then is it not inconsistent to say that he may do so by delivery of the bill of lading? If his delivery of the goods themselves as a pledge will not pass the property, much less shall his delivery of the bill of lading operate in that manner."

Le Blanc, J., observed: "I do not know that the trade of the country will suffer much risk by our holding that in a case where if the goods themselves had come into the factor's hands he could not *pledge* them, he shall not be able to *pledge* them by means of the instrument which gives him authority to receive the goods. Some of the cases, indeed, state the opinion of the judges generally, that no indorsement of a bill of lading will pass the property, but that must be taken with reference to the circumstances of the case, and is not to be applied to the case of a factor *pledging* the goods of his principal, but to that of a vendor *selling* goods in which he has a property. The cases show, indeed, that where either vendee or factor intend to *sell* the goods, the indorsement of the bill of lading for that purpose will bind the vendor or principal. The case of *Wright v. Campbell* appears, I think, to be that of a *sale*; for it was agreed that Scott, the indorser of the bill, should *sell* the goods. But at least we may say of it, that it is not an authority for holding that a factor may *pledge* the bill of lading, though he could not *pledge* the goods themselves. And our now determining that a factor cannot make such a pledge will not break in at

all upon the doctrine of *Lickbarrow v. Mason*, that the indorsement of a bill of lading upon the sale of the goods will pass the property to a *bona fide* indorsee, the property being intended to pass by such indorsement" (*Newson v. Thornton*, 6 *East's R.*, 17).

The common-law doctrine, that the possession of a factor or broker does not authorize him to pledge the property, is clear and well settled. As before intimated, the English authorities are uniform upon the subject, and the doctrine has been frequently recognized by the American courts. It was said in an early case in the State of New York, that although a factor cannot pledge the goods of his principal as his own, yet he may deliver them to a third person as security, with notice of his lien, and as his assent to keep possession for him in order to preserve that lien (*Urgu hart v. McIver*, 4 *Johns. R.*, 103). And it has been repeatedly decided in Massachusetts that a factor has no right to pledge the goods intrusted to him (*Newell v. Pratt*, 5 *Cush. R.*, 111; *Kinder v. Shaw*, 2 *Mass. R.*, 398; *Jarvis v. Rogers*, 15 *ib.*, 389; and *vide Odiorne v. Maxey*, 13 *ib.*, 178). And the Circuit Court of the United States for the district of Massachusetts decided that a factor could not pledge the goods of his principal for his own debt; and if he does, that the principal may, after a demand and refusal, maintain trover for them against the pawnee (*Van Amringe v. Peabody*, 1 *Mason's R.*, 440).

The courts of the State of South Carolina have recognized the same doctrine, holding that a consignee or factor cannot pledge the goods of his principal for his own debt; although it was declared that a sub-agent might have a lien upon the goods for advances made by him (*Bowie v. Napier*, 1 *McCord's R.*, 1). And in an early case in the State of Pennsylvania it was held that no custom for factors to pledge the goods of their principals could be pleaded (*Newbold v. Wright*, 4 *Rawle's R.*, 195; and *vide Laussatt v. Lippincott*, 6 *Serg. & Rawle's R.*, 385).

And the Supreme Court of Alabama held, so late as 1853, that a factor or commission merchant is not authorized by law to pledge the goods of his principal for his own use, and that his pledgee can acquire no title to them, as against the principal, whether he dealt with the factor in ignorance of his title or not; that the principal, in case of such attempted pledge, may bring trover against the factor and his pledgee, or either of them, at his election. It was, however, declared that the factor is estopped by his

own tortious acts, and that he cannot take advantage of the violation of his duty or authority to set aside the contract. And it was further held that a subsequent purchaser of the factor acquires no better title than the factor himself had, and cannot recover the goods from the pledgee, although the sale was made within the scope of the factor's authority (*Bott v. McCoy*, 20 Ala. R., 578).

This is the common-law doctrine upon the subject; but the rule has been changed by statute in England, and in many of the American States. By the present statute of England, the taking of goods or bills of lading in pledge from the consignee thereof is rendered lawful, but the consignee cannot thereby give any better or greater right to the goods than he himself possessed (4 *Statute of Geo. IV*, ch. 83, amended by statute 6 *Geo. IV*, ch. 94, commonly called the *Factors' Act*, and also amended by statute 5 and 6 *Vict.*, ch. 39).

Under these statutes the factor has power to pledge the property consigned to him to the extent of the interest which he has in the goods, which is a right to be indemnified against the bills he has accepted, and nothing more (*Vide Fletcher v. Heath*, 1 *Man. & Ry. R.*, 335). And the court have held that the right of the factor, under the statute, to pledge the goods of his principal depends on the question whether, on the face of the whole account between them, the principal is indebted to the factor. Therefore, where a factor kept both a joint and separate account with his principal, and upon the *two* accounts was indebted to him, but on the separate account against which the draft was drawn the balance was in the factor's favor, it was held that the factor had no right to pledge, and that the pledgee could not retain the goods against the principal, even though the principal, for some time after notice of the pledge, forbore to make any demand upon the pledgee, unless it could be shown that the effect of such forbearance had been to alter the position of the principal for the better, or of the pledgee for the worse (*Robertson v. Kensington*, 5 *Man. & Ry. R.*, 381). And in another case, where the pledge was by a factor for an antecedent debt, the court held that the defendants, being the pawnees, could not hold the proceeds against the real owner, but that, in estimating the damages, they were entitled to credit for any balance due from the owner to the factor (*Taylor v. Freeman*, 1 *Mood. & Mal. R.*, 453).

Under the English statute a pledge by a pawnor, who is known

to have received the goods or documents as the agent of the owner, for the purpose of sale, will be perfectly valid. In order to vitiate such a transaction, it is not sufficient that the owner should have transmitted the articles simply with directions to sell, and that this was known to the pawnee, but there must have been a prohibition of pledging by the owner, and notice of it to, or *mala fides* on the part of, the pawnee making the advance. Mere suspicion, or a slight suspicion, will not take away the protection of the statute, indeed, it has been declared that *no* suspicion will affect the transaction. If there is not *mala fides*, there is an end of the case. The evidence for the jury, where there is no evidence of direct communication, is, whether the circumstances were such that a reasonable man and a man of business, applying his understanding to them, would *know* that the goods were not the property of the pledgor. If so, the pledgees are not entitled to retain (*Navulshaw v. Brownrigg*, 1 *Sim. N. S. R.*, 573; *S. C.*, 2 *De G., M. & G. R.*, 441; *Evans v. Freeman*, 1 *Mood. & Mal. R.*, 10).

Where A. pledged goods with B., a broker, who repledged them to C., to secure advances of which, unknown to C., A. was to have the benefit, it was held that A. had no equity to restrain C. from selling immediately on B.'s default. A person holding bills for the purpose of getting them discounted has no power to pledge them, or to mix them with bills of other customers and pledge the whole in a mass to secure a loan to himself (*Haynes v. Foster*, 4 *Tyrwhitt's R.*, 653).

The pawnor who claims the benefit of the statute must have acted *bona fide*, and without corrupt agreement or understanding with the pledging factor. Therefore, where a plaintiff had consigned goods to his agent, who was liable, together with the defendant, on a bill of exchange which had become due, obtained from the defendant £300 to take up the bill, and at the same time deposited with him some of the plaintiff's goods, the judge told the jury that if they thought the transaction was only a circuitous mode of paying the bill on which the defendant was liable, it was not within the protection of the act. The jury found for the plaintiff, and the Court of Exchequer unanimously upheld the ruling (*Learoyd v. Robinson*, 12 *Mees. & Welsb. R.*, 745).

But when there are no *mala fides*, the principal may be bound by the acts of his agent, even when acting under an authority defective in form. As when B. authorized R., by power of attor

ney, to borrow money and grant a mortgage, R. employed, with leave, a sub-agent, who got the money from D., on producing the power of attorney and a declaration signed by B. The power of attorney was invalid, and R. failed to account to B. The court held that B. was estopped from setting this up as against D., and was bound by the acts of R., for the borrowing was not upon condition of the mortgage being valid (*Denysson v. Botha*, 2 L. T., N. S., 126). And the rule is as applicable in cases of persons making pledges as in other matters, that, where authority to an agent is general, it will be construed liberally, but according to the usual course of business in such matters; when it is given by parol and is ambiguous, it is to be construed according to the course of trade in such matters; and when it is unexpressed, it is to be ascertained by investigating the course of dealing pursued by the several parties to the transactions (*Pale v. Leash*, 28 Beav. R., 562).

Where bankers advanced money in the way of their business and *bona fide*, as security of goods deposited with them, to Sydney Linnet, by agreement with or at the request of John Linnet, and John being afterward entrusted by Sydney, as agent of the plaintiff, with jewels, which he deposited with the bankers as security for past advances to Sydney, and for further advances to be made to Sydney on John's request, and that John should receive back the goods first pledged, the court held that the case was within the factor's act (5 and 6 Vict., ch. 39), and that proof given by plaintiff of his agent's fraud would not take it out of the meaning of the statute (*Sheppard v. Union Bank of London*, 5 L. T., N. S. Ex. R., 757). But one partner of a firm cannot legally deposit in pledge shares of capital stock belonging to the firm to the bank to secure the payment of money advanced to him individually, if the bank is cognizant of all the facts. And where one member of a firm deposited shares on his own private account, the court held that this did not give the bank the right to retain such shares as security for a debt due from him jointly with other members of his firm (*Ex parte McKenna, in re Mortimer*, 7 Jur. N. S., 588; S. C., 4 L. T. N. S., 164). And as *modus et conventio vincunt legem*, so they will also override any custom to which they are repugnant, as where a customer deposited a deed of conveyance with his bankers, giving at the same time a memorandum, pledging one of the properties as security for a specific sum, and also for his general balance, it was held that as the deposit of the deed was for the special purpose of

giving a security on one property only, the bankers could claim no general lien, by the custom of bankers, on the properties (*Wylde v. Radford*, 33 *L. J.*, *ch.* 51; *S. C.*, 9 *Jur.*, *N. S.*, 1169). But perhaps these statements are not as pertinent to the discussion of the question of the person of the pawnor or pledgor as to some other aspect of the subject of pawns and pledges. Similar legislation to the English, in respect to the power of factors to pledge property in their possession, has taken place in several of the American States; and in all cases where the question is regulated by statute, the statute must be consulted for the rules governing the subject. In this connection the question is examined solely in its relations to the person of the pawnor or pledgor. In subsequent pages, pledges by factors will be considered in other of its phases in connection with the subject of pawns or pledges in its more general features.

Upon this subject the statute of New York provides that every person in whose name any merchandise shall be shipped shall be deemed the true owner thereof, so far as to entitle the consignee of such merchandise to a lien thereon for any money advanced, or negotiable security given, by such consignee, to or for the use of the person in whose name such shipment shall have been made; and for any money or negotiable security received by the person in whose name such shipment shall have been made, to or for the use of such consignee; provided, however, that the lien shall not exist when the consignee shall have notice, by the bill of lading or otherwise, at or before the advancing of any money or security by him, or at or before the receiving of such money or security by the person in whose name the shipment shall have been made, that such person is not the actual and *bona fide* owner thereof.

The statute further provides that every factor or other agent intrusted with the possession of any bill of lading, custom-house permit, or warehouse keeper's receipt for the delivery of any such merchandise, and every such factor or agent not having the documentary evidence of title, who shall be intrusted with the possession of any merchandise for the purpose of sale, or as security for any advances to be made or obtained thereon, shall be deemed to be the true owner thereof, so far as to give validity to any contract made by such agent with any other person, for the sale or disposition of the whole or any part of such merchandise, for any money advanced, or negotiable instrument or other obligation in writing

given by such other person upon the faith thereof. But it is declared that every person who shall accept or take any such merchandise in deposit from any such agent, as a security for any antecedent debt or demand, shall not acquire thereby or enforce any right or interest in or to such merchandise or document, other than was possessed or might have been enforced by such agent at the time of such deposit.

In all cases the true owner of any merchandise so deposited may demand and be entitled to the possession of the same, upon repayment of the money advanced, or on restoration of the security given, on the deposit of such merchandise, and upon satisfying any lien that may exist thereon in favor of the agent who deposited the same (*Laws of 1830, ch. 179, 4 Stat. at Large, 461, 462*).

Under this statute it has been held that a person making advances to a factor upon property in his own possession, for the purpose of sale, will not be protected by the provisions of the statute; provided he had knowledge at the time of the advances that the factor was not the owner of the goods. The court referred to the common-law rule, that a factor could not pledge the goods so as even to transfer his lien to the pledgee, and then decided that the provisions of the statute, taken in connection with the previous law upon the subject, evidently protected pledgees who had advanced their money or given their negotiable note or acceptance or other written obligation, upon the faith or belief of the fact that the person with whom they dealt was the real owner of the property. It was thought that any other construction of the statute would authorize the agent or factor to commit a fraud upon his principal, with the connivance of the purchaser or pledgor, who had notice of the fiduciary character of the vendor or pledgor. And it was further declared that the statute of New York does not, like the English statute, authorize the agent or factor to pledge the goods of his principal, to the extent of his own lien, to persons who are aware of his fiduciary character, and without any authority for that purpose from his principal (*Stevens v. Wilson, 3 Denio's R., 472*).

But even under the British statute it has been held that a mere liability of the agent or factor, upon acceptances for his principal, is not sufficient to give such agent or factor a lien which will authorize him to pledge the goods to a third person, without the consent of the principal. In two important cases, especially, the factor

was under acceptances for his principal at the time he pledged the goods for advances thereon, but which acceptances the principal afterward duly paid or provided for. And it was held that the pledgee could not hold the goods to the amount of the acceptances for which the factor was liable at the time the goods were pledged, but which he was not afterward compelled to pay (*Fletcher v. Heath*, 7 Barn. & Cress. R., 517; *Blandy v. Allan, Dawson and Lloyd's Mercantile Cases*, 22). This is a distinction important to be borne in mind, even in cases where parties deal with reference to the protection of the statute.

A simple trustee has no power to pledge the property of the *cestui que trust* as a security for his own personal debt or obligation, nor ordinarily to secure the payment for advances in favor of the *cestui que trust* himself. And if such trustee should thus pledge the trust property to a person having knowledge of the trust, the transaction would be void. In a late case decided by the Supreme Judicial Court of Massachusetts, it was held that one holding stock as trustee has *prima facie* no right to pledge it to secure his own debt growing out of a transaction independent of the trust. And it was declared that if a certificate of stock issued in the name of "A. B., trustee," is pledged by him to release his own debt, the pledgee is, by the terms of the certificate, put on inquiry as to the character and limitations of the trust; and if he accepts the pledge without inquiry, he does so at his peril.

Foster, J., delivered the opinion of the court, and on this point said: "It cannot possibly be material whether the manual delivery of the certificates was by Mellen or by Carter himself. Unless the word 'trustee' may be regarded as mere *descriptio personæ*, and rejected as a nullity, there was plain and actual notice of the existence of a trust of some description. A trust, as to personality or choses in action, need not be expressed in writing, but may be established by parol. And that the mere use of the word 'trustee,' in the assignment of a mortgage and note, imports the existence of a trust, and gives notice thereof to all into whose hands the instrument comes, has been expressly decided by this court (*Sturtevant v. Jaques*, 14 Allen, 523; see, also, *Bancroft v. Cousen*, 13 Allen, 50; and *Trull v. Trull*, *Id.*, 407). It is insisted, on behalf of the defendants, that even if there was actual notice of the existence of a trust, there was no notice of its character, and that the trust might have been such as to authorize the transfer which

was made by Carter. But, in our opinion, the simple answer to this position is that, where one known to be a trustee is found pledging that which is known to be trust property, to secure a debt due from a firm of which he is a member, the act is one *prima facie* unauthorized and unlawful, and it is the duty of him who takes such security to ascertain whether the trustee has a right to give it. The appropriation of corporate stock held in trust as collateral security for the trustee's own debt, or a debt which he owes jointly with others, is a transaction so far beyond the ordinary scope of a trustee's authority and out of the common course of business, as to be, in itself, a suspicious circumstance, imposing upon the creditor the duty of inquiry. This would hardly be controverted in a case where the stock was held by 'A. B., trustee for C. D.' But the effect of the word 'trustee,' alone, is the same. It means trustee for some one whose name is not disclosed; and there is no greater reason for assuming that a trustee is authorized to pledge for his own debt the property of an unnamed *cestui que trust*, than the property of one whose name is known. In either case it is highly improbable that the right to do so exists. The apparent difference between the two springs from the erroneous assumption that the word 'trustee,' alone, has no meaning or legal effect.

"Inasmuch as such an act of pledging property is *prima facie* unlawful, there would be little hardship in imposing on the party who takes the security, not only the duty of inquiry, but the burden of ascertaining the actual facts at his peril" (*Shaw v. Spencer*, 100 *Mass. R.*, 382, 389, 390).

This case was very ably argued and carefully considered by the court, and is important as settling, beyond controversy, the doctrine that the pledging of trust property by the trustee, for the security of his own debt or obligation, is unlawful, and also as throwing light upon the doctrine of constructive notice, in such a case, to the pledgee.

Substantially the same doctrine was incidentally recognized in the decision of a case before the Circuit Court of the United States for the district of New Jersey (*Vide Martin v. The Somerville Water Power Company*, 27 *How. Pr. R.*, 161).

It has been before suggested that a married woman may act as the agent of her husband, under a proper appointment, so that a pledge of her husband's property, by her, may be valid and binding on

the husband. But she has no such power simply from her relations to her husband as his wife. Where a debtor left the State on account of his pecuniary embarrassments, having given verbal directions to an individual to assist in the settlement of his affairs, it was held by the Supreme Judicial Court of Massachusetts that such individual was not thereby authorized to pledge the debtor's property as security for a debt, and that neither had the wife of the debtor, who had the care of settling the debtor's affairs in his absence, any such authority to make the contract of pledge of her husband's property to secure his debts (*Swett v. Brown*, 5 Pick. R., 178).

The result is, that any person, competent in general to make a valid contract, is capable of pledging his own goods, chattels and personal effects, as a security of a debt or obligation; and also any person duly authorized to act as the general agent of the owner of the property, or who has special authority to make the pledge, may pledge the property of his principal in good faith, so as to make it binding on the principal. The wife cannot ordinarily make a valid pledge of her own property or that of her husband, although she may act as the agent of her husband; and, where the authority is general, or specially extended to such business, she may make a valid pledge of his property; and in those cases where the statute empowers a *feme covert* to hold personal property and deal with it as a *feme sole*, and the like, she may make a valid pledge of her own property the same as a *feme sole*. In respect to a factor, he has no power, at common law, to affect the property consigned to him by pledging it as a security or satisfaction for a debt of his own; and it is of no consequence that the pledgee is ignorant of the factor's not being the owner. When goods are so pledged or disposed of, the principal may recover them back by action against the pawnee, without tendering to the factor what may be due to him, and without any tender to the pawnee of the sum for which the goods were pledged, or indeed without any demand of such goods, according to some of the cases; and it is no excuse that the pawnee was wholly ignorant that he who held the goods held them as the mere agent or factor, unless the principal has held forth the factor or agent as the principal or owner of the goods so pledged. The common-law rule has been changed in some cases by statute, and in those instances the subject will be governed by the provisions of the statute; some rules

respecting which have been hereinbefore referred to. And with respect to minors, their contracts of pledge of their own property are voidable at their own election; and when they elect to avoid them, they must proceed as in other cases where they seek to disaffirm their own acts. This is probably all that is necessary upon the important subject of the *person* of the pawnor or pledgor.

CHAPTER XLI.

THE TITLE OF THE PAWNOR OR PLEDGOR, AND HIS PROPERTY IN THE THING PLEDGED OR PAWNED—HIS OBLIGATIONS AND DUTIES IN RESPECT TO THE THING PAWNED OR PLEDGED.

FROM the very nature of the contract of pawn or pledge, it is quite obvious that the pawnor does not lose all right to the pawn when he parts with the possession. Indeed, the real distinction between a pawn or pledge and a chattel mortgage is, that in a pledge the legal property continues in the pawnor, and only a special property passes to the pawnee; whereas, in a chattel mortgage, the legal property is in the mortgagee, subject to being defeated by performance of the conditions of the instrument by the mortgagor. It was said by the chief justice of the Court of King's Bench of England, that "pledging does not make an absolute property, but is a delivery only till payment, and may be redemanded at any time upon payment of the money; for it is delivered only as a security for the money lent; and there is a difference between the mortgaging of land and pledging of goods; for the mortgagee has an absolute interest in the land, whereas the other has but a special property in the goods to detain them for his security." And in another place it is observed: "The delivery is nothing but the bare custody, and it is not like to a mortgage, for then he that has interest ought to have the money; but in the case of a pledge it is only a special property in him that takes it, and the general property continues in the first owner," *quod non fuit negatum* (*Ratcliff v. Davis*, Cro. Jac., 245; *S. C.*, *Yelverton's R.*, 178). This doctrine is well settled and often recognized by the courts (*Vide Cortelyou v. Lansing*, 2 *Cal. Cas.*, 200; *Barrow v. Paxton*, 5 *Johns. R.*, 258).

The Superior Court of the city of New York has held, in a late

case, that the mere deposit of promissory notes by a holder, before maturity, with a creditor, without indorsement, as collateral security, will not divest the pledgor of his legal ownership, but will only vest in the creditor, as pledgee, a contingent equitable interest in the notes, or the proceeds thereof, in case the debt should not be paid, subject to a prior equity then existing in favor of the maker against the pledgor (*Snow v. Fourth, etc., Bank, 7 Rob. R., 479*).

It was declared by Edmonds, Circuit Judge, that the difference between a mortgage and a pledge, as to matter of right, is, that in the one case the title passes, and in the other it does not; but that the difference, in substance and fact, is, that in the case of a pawn the possession of the article must pass out of the pawnor; in the case of a mortgage, it need not. And in determining whether an agreement is a pledge or a mortgage, regard must be had to these two considerations. The mortgagee takes the legal title. In the case of a pledge, however, it is different; the legal title, until a sale in default of payment or redemption, continues in the pledgor (*Haskins v. Patterson, 1 Edm. N. Y. Select Cases, 201*).

The legal title to the property pledged always remains in the pledgor until it is extinguished by proceedings taken by the pledgee; but from the fact that the *possession* must be in the pledgee, at common law goods pledged were not liable to be taken in execution in an action against the pledgor until an extinguishment of the pledgee's title, which is a special property in the thing pledged. Recognizing the general property in the pledgor of the thing pledged, the legislatures of several of the States have passed statutes to enable the creditor of the pledgor to reach his interest by execution, provided such interest may be sold on execution, or provided the articles pledged are of the character that may be reached by execution. Thus the Revised Statutes of the State of New York provide that "when goods or chattels shall be pledged for the payment of money or the performance of any contract or agreement, the right and interest in such goods of the person making such pledge may be sold on execution against him, and the purchaser shall acquire all the right and interest of the defendant, and shall be entitled to the possession of such goods and chattels on complying with the terms and conditions of the pledge" (2 *R. S.*, 366, § 20; 2 *Stat. at Large*, 379).

The old Supreme Court of the State of New York held that the words "right and interest" of the pledgor, used in the statute,

were equivalent to pronouncing the title of the pledgor in the thing pledged "personal property," or rather that the term "*personal property*" would include the "*right and interest*" which the pledgor has in the thing pledged. And hence, it was held that the sheriff, holding an execution against a pledgor, may, by virtue thereof, take the property pledged out of the possession of the pledgee into his own possession, and sell the right and interest of the pledgor therein; but that after the sale by the officer in such a case, the pledgee is entitled to the possession of the property until the purchaser redeems it from the pledgee. The judgment of the Supreme Court holding this doctrine was affirmed by the Court of Appeals of the State, the judges being equally divided upon the question. It was contended on the argument of the case in the Court of Appeals, on the one side, that the statute, which has changed the common law, and authorizes the sale of the interest of the pledgor in the property pledged, does not authorize the removal of the property out of the possession of the pledgee. That the provisions of the statute, taken together, negative, by implication at least, if not expressly, the right of the officer or of any other person to remove the pledge from the possession of the pledgee. At all events, it was argued that the statute contains no authority for the officer having the execution to take the goods pledged into his own possession, or to do any other act in respect thereto than to dispose of the same by sale; that the sheriff, by the levy, acquires no other right in the goods pledged than that which at the time remained in the pledgor, and as the pledgor clearly had not the right to the possession himself, and could not legally interfere with the possession of the pledgee, so the sheriff, by his levy, acquired no such right. It was further argued that an actual taking and removal of the pledge was not a necessary incident to a sale thereof by the sheriff; or, in other words, that the right to sell, given by the statute, did not imply a right to remove and that the sale might be effected without an actual interference with the pledgee's possession. And it was finally urged, in support of this view, that the rights of the pledgee are as important as those of the judgment creditor; that they are also prior in point of time, and both should be respected; and that such a construction should be given to the statute as will enable the creditor to reach the interest of the pledgor without essentially impairing the right of the pledgee under his contract. On the contrary, it was argued

that the statute subjects the sale of pledged goods, by appropriate language, to the same regulations which prevail in other cases. And by one section of the statute it is declared "that no personal property shall be exposed for sale by the sheriff unless the same be present and within the view of those attending the sale" (2 *R. S.*, 366, § 23; 2 *Stat. at Large*, 380). It was said, therefore, that the sheriff must have power to take the goods into his custody; because without it he cannot produce the goods at the sale. It was thought that it could not be seriously urged that the officer may discharge his duty, without a levy, by advertising the goods to be sold on the premises of the pledgee for the purpose of having them within the view of the bidders there, while the goods may be removed at the pleasure of the pledgee beyond the reach of the sheriff or purchaser. And, moreover, it was argued, if the statute gives the sheriff no authority to take the goods for the purpose of a sale, it gives him none to enter on the pledgee's premises for that purpose; for the sale may as well be anywhere else as there, unless it be in connection with the power to exhibit the goods to the persons attending the sale. It was also argued that there might be a collusive understanding between the pledgor and pledgee of property not having a uniform quality and value in the market, to keep the articles concealed, while the execution creditor could have no hopes of selling the goods for their value unless they were exhibited at the sale, or in some way submitted to the examination of the purchasers. And where there was no such collusion, that the sale without viewing the goods would be oppressive and injurious both to the pledgor and the execution creditor; that the removal or concealment of the goods by the pledgee would give him an advantage at the sale over all others, and would enable him to buy at the sale at a merely nominal price. Again, it was said, it may be necessary in the case of goods pledged to have them produced at the sale for the purpose of selling, in lots or parcels, according to the terms of the statute; for it may frequently happen that the sale of a part of the goods, if they are in view of the buyers, may be sufficient to satisfy the pledge; and in such case the residue should be divided and sold in the ordinary way. The purchaser ought, moreover, to have the opportunity at the sale of complying with the terms and conditions of the pledge, and of taking possession of the property. This just advantage he loses if the goods are not produced.

It was finally urged, that the prevention of frauds, and the protection of the rights of the creditors of the pawnor of goods, could not have been effectually accomplished in any other way than by subjecting sales, such as that in question, to the same regulations as exist in other cases of personal property; that it was not to be presumed that the power of the officer will be exercised oppressively; that the possession of the pledgee will seldom be actually disturbed; and that if it be interrupted the interference will commonly lead to the satisfaction of the pledge. But if it should not, it was added, the probable injury to the pawnee of the goods is not to be compared with the evil which is likely to result from a sacrifice of the value of the goods by a sale at which the purchaser cannot know the quality or value of the article he buys, or where to find it when bought.

These two general processes of reasoning were severally concurred in by an equal number of the judges of the Court of Appeals, so that the judgment of the Supreme Court, deciding that the sheriff in such a case may, by virtue of an execution against the pledgor, take the property out of the hands of the pledgee into his own possession, and sell the right and interest of the pledgor therein, was affirmed, and so the law remains to the present day (*Stief v. Hart*, 1 *N. Y. R.*, 20). This is an important decision in respect to the interest of the pledgor in the property pledged, under the statutes of New York, and is interesting in its application there, and also in many other States having similar statutes upon the same subject.

The term pledge, applied to chattels in its strict sense, denotes a bailment or actual delivery of goods by a debtor to his creditor, to be kept by him till the debt is discharged. It is a delivery of a thing for the security of some engagement, and the legal title and general property therein continue in the pledgor; and in this it is distinguished from a mortgage, which is a grant or conveyance of the goods, and by it the whole legal title passes conditionally to the mortgagee. Pledge, in its proper sense, when applied to goods, does not comprehend a mortgage; but the reverse is not quite true, for a mortgage of goods is a pledge and more, for it is an absolute pledge, to become an absolute interest if not redeemed at the specified time. The distinction is very exactly given in the works on Bailment, and is quite familiar to the profession. The old Supreme Court of the State of New

York, in the examination of the same question presented in the case of *Stief v. Hart* (1 N. Y. R., 20), remarked: "The general property of the goods remains in the pledgor, and the goods are sold subject to the lien. * * * The intention of the statute seems to have been that the sheriff should seize and detain the goods in the same manner as if they were not under pledge; and put them up at auction as he must other goods. The only difference is that, in cases of pledge, he must sell subject to the lien. He should have the goods present, and hold them in custody of the law to await a redemption by the purchaser. If they are not redeemable presently, or, if redeemable, and they are not redeemed presently, he should then deliver them into the custody of the pledgee, to whom the purchaser must look for them. In short, the statute intended, as it declares, to vest in the purchaser the precise right of the pledgor. It is essential to the right of all concerned, that the property should be subject to the view of the purchasers. The common-law disability of the sheriff to seize goods in pledge is removed. His right to take and hold them *pro hac vice* arises by necessary implication from the two sections cited. Where the law gives a man anything, it gives him the means of obtaining it" (*Bakewell v. Ellsworth*, 6 Hill's R., 484-486). If the pawnor has only a limited title to the thing, as for life or for years, he may still pawn it to the extent of his title; but when that expires, the pawnee must surrender it to the person who succeeds to the ownership, although the pawnee had no notice that the pawnor was not the absolute owner (*Howe v. Parker*, 2 T. R., 376). In such case, the pawnor retains the title to the property, such as it was, subject simply to the terms of the pledge, and the rights of the pledgee.

The English Court of King's Bench declared that, where a broker *pledges* the goods of his principal as his own, the pawnee who claims by such *tortious* act of the broker, cannot claim to retain against the principal in trover for the amount of the lien which the broker had on the goods for his general balance at the time of such pledge. But it was intimated that the rule would be otherwise where one who has a lien delivers the goods to a third person as security, with notice of the lien, and appoints him to continue his possession as his servant for the preservation of his lien.

Lord Ellenborough, C. J., said that nothing could be clearer than that liens were personal, and could not be transferred to third

persons by any *tortious* pledge of the principal's goods; that, whether or not, a lien might follow goods in the hands of a third person, to whom it was delivered over by the party having the lien, purporting to transfer his right of lien to the other, as his servant and in his name, and as a continuance, in effect, of his own possession, yet it was quite clear that a lien could not be transferred by the *tortious* act of a broker *pledging* the goods of his principal, which he had no authority to do.

His lordship then made some other remarks, of which the reporter gives the substance, when he consulted with the other judge and declared that the rest of the court coincided with him in opinion that no lien was transferred by the pledge of the broker in the case at bar, and added that he would have it fully understood that his observations were applied to a *tortious* transfer of the goods of the principal by the broker undertaking to *pledge* them *as his own*, and not to a case of one who, intending to give a security to another to the extent of his lien, delivers over the actual possession of goods, on which he has the lien, to that other, with notice of his lien, and appoints that other as his servant to keep possession of the goods for him, in which case he might preserve the lien (*McCombie v. Davies*, 7 *East's R.*, 5). And this is in accordance with other authorities upon the same subject (*Vide Urquhart v. McIver*, 4 *Johns. R.*, 103)

If the party who has pledged the goods was not the owner of them, the pawnee will not be justified in delivering them to the true owner, if the pledgor has a special property in them, which he is entitled, under the circumstances, to assert against the true owner. This doctrine recognizes the principle extracted from the authorities by Judge Story, that the pledgor may convey his interest in the thing pledged conditionally, by way of pawn, to another person, without destroying his security (*Vide Story on Bailm.*, § 324). And if the pledgor holds the pledge merely as a pledge from the owner, the second pledgee may discharge himself from any obligation to the owner by delivering it up to his own pledgee at any time before the offer to redeem be made by the owner.

If a clause is inserted in the original contract, providing that, if the terms of the contract are not strictly fulfilled at the time and in the mode prescribed, the pledge shall be irredeemable, such clause will not be of any avail, for the common law deems such a stipulation unconscionable, on the ground of public policy, as tend-

ing to the oppression of debtors. This is the doctrine laid down by Story, and it is sustained by express authority (*Story on Bailm.*, § 345). And it seems that the pledgor does not forfeit the general property he has in the thing pledged by neglecting to pay the debt, or perform the act at the time stipulated in the contract; that is to say, by the neglect of the pawnor to pay the debt or perform the obligation for which the pledge is given to secure, within the stipulated time, the absolute property in the pledge does not, thereby, pass from the pawnor to the pawnee. This doctrine is said to be, at least, as old as the time of Glanville. And it is added by Story that if the pawnee does not choose to exercise his acknowledged right to sell, he still retains the property as a pledge; and, upon a tender of the debt, he may be compelled to restore it (*Story on Bailm.*, § 346; and *vide Glanville*, lib. 10, ch. 16; 1 *Reeves*, 161, 163). This is the rule, provided the matter is not allowed to sleep, until the presumption may be reasonably indulged that the pledgor does not design to redeem the property pledged, when his right may be deemed to be extinguished and the title of the pledgee to be absolute; that is to say, under such circumstances a court of equity might decline to interfere for the relief of the pledgor.

In a case where the assignee of a bankrupt brought a bill for the redelivery of jewels pledged by the bankrupt, on payment of the sum due upon them, it was held that where no time was given for redemption, the pawnor might redeem during life, if the pawnee had not exercised his right to sell. And in the same case it was also held that the statute of limitations was no bar to the demand; or, in other words, that the statute of limitations would not run against such a demand (*Kemp v. Westbrook*, 1 *Ves. R.*, 278). But this subject will be more appropriately treated in a subsequent chapter. The Roman law, it seems, allowed the parties to a pledge to agree that, upon default in payment, the creditor should be at liberty to take the thing pledged at a stipulated price, provided it was its reasonable value and the transaction was *bona fide*; and the modern continental nations of Europe have adopted the same or a similar rule. Whether the same principle exists in the common law, Story says does not appear to have been decided. But he thinks there is no doubt that a subsequent agreement to that effect, or a subsequent waiver of the right to redeem, if made under proper circumstances, would be held bind-

ing between the parties ; and as authority for his opinion he cites the case of *Stevens v. Bell* (6 *Mass. R.*, 339), decided many years ago (*Story on Bailm.*, § 345).

In respect to the obligations of the pledgor, it may be affirmed that by the act of pledging he impliedly engages that he is the owner of the property pledged ; and, when the ownership of any part of it is not in him, he is liable to the pledgee in damages, if by reason of defective title it is taken from him (*Mairs v. Taylor*, 40 *Penn. R.*, 446). This doctrine would not, however, apply in its full effect where the pledgor had only a special property in the article pledged, and gave notice to the pledgee of the extent of the interest which he claimed in the property pawned. But where no notice is given of a different interest, the pledgor enters into an implied warranty that he is the general owner of the property pledged ; and in all cases he impliedly undertakes that he has good right to pass the pawn. And if he violates this engagement, either by a tortious or by an innocent bailment of property which is not his own, or by exceeding his interest therein, he is liable to the pawnor in an action for damages (*Mairs v. Taylor*, *supra* ; *Story on Bailm.*, § 354, and authority cited). It is obvious from this doctrine that the pawnor is also under an implied engagement not to interfere with the property pledged, nor do any act which shall impair the rights of the pledgee, until the pledge is redeemed or extinguished.

Judge Story quotes the substance of a passage from Pothier, to the effect that if the pawn has a defect, unknown to the pawnee, which destroys its value, the French law gives him a right of action for another pawn in its stead (*Pothier, de Nantissement*, n. 54). And the learned author adds : " This seems highly reasonable ; the common law, however, does not give any such right. But in such a case an action will lie at common law against the pawnor, upon his implied engagement or warranty of title ; and, *a fortiori*, if fraud is practiced by the pawnor, an action for damages will doubtless lie against him. Perhaps, also, the whole contract may, under such circumstances, at the option of the pawnee, be rescinded by a court of equity. The pawnee indeed is, in all cases of this sort, bound to good faith, and is responsible for all frauds, not only in the title, but in the concoction of the contract (*Pothier, de Nantissement*, n. 59). Thus, if he should fraudulently misrepresent the nature or quality of the thing pledged, as, for example, if he should

pledge a vase of brass, asserting it to be gold, he would be liable herefor; for it is a rule of the common law that fraud vitiates every contract; and damages, by way of recompense, may be recovered for all injuries occasioned by fraud. The like rule prevails in the Roman law; and, indeed, fraud is denounced therein with studied reprobation. * * * But, whenever there is a defect in the pawn, or in the title to it, there is no pretense to impute fraud, if the pawnee takes it with full knowledge of all the circumstances, for he is then bound by his contract, as he has chosen to make it; and, *volenti non fit injuria*. The Roman law has promulgated the like doctrine. * * * The same doctrine is also fully recognized in the French law" (*Story on Bailm.*, §§ 355, 356). And it may be suggested that these general principles are elementary, and are quite familiar to the profession; and they are as applicable in cases of contracts of pledge as in others where they are uniformly applied.

Another principle may be stated upon authority; and that is, that a party who pledges to another goods which he does not own, and at the same time makes delivery of them, is estopped from setting up a title to the goods subsequently acquired during the existence of the pledge; and the pledgee in such case may recover possession of them as against him or any party possessed of them without right (*Goldstein v. Hart*, 30 Cal. R., 372).

Another obligation of the pledgor, by the Roman law, is to reimburse to the pawnee all expenses and charges which have been necessarily incurred by the latter in the preservation of the pawn, even though, by some subsequent accident, these expenses and charges may not have secured any permanent benefit to the pledgor. This is the doctrine of the Roman law, as understood by Judge Story, though he finds no decision in the common law upon the point. He affirms, however, that if there is an express contract to pay such expenses, such contract doubtless ought to govern the case. And where the circumstances of the case naturally lead to an implied agreement to the same effect, it will be equivalent to an express declaration of a similar import. But the learned author on Bailments adds, whatever may be the rule as to ordinary expenses and charges in a case of mutual silence, it seems but reasonable that extraordinary expenses and charges, which could not have been foreseen, should be reimbursed by the pledgor. If (he supposes) a horse is pawned, and meets with an injury by accident, the

expenses of his cure, he very justly thinks, would be chargeable upon the pledgor, because incurred for his ultimate benefit. So, he affirms upon authority, if a ship, which is pledged, is injured by a storm, and expenses are necessary to preserve her from absolute foundering, such expenses seem properly to fall on the owner (*Story on Bailm.*, § 357).

In respect to the necessary expenses incurred in the preservation and care of the thing pledged, it is very clear that they would be covered by the pledge, and the pledgor would not be entitled to a return of the property until it was redeemed, not only from the original debt or obligation it was given to secure, but the expenses incident to the pledge. And, perhaps, on this principle, the pledgor might be made personally liable to pay such necessary expenses, provided the pledge was not sufficient to reimburse the pledgee for the expenses incurred.

When the expenses incurred in relation to the pledge are not necessary, but still are useful, to the thing preserved, it seems that the Roman law pursued a middle course, and left them to be allowed or disallowed by the proper tribunal, according to circumstances. If the expenses were very large and onerous, they were not to be allowed. If moderate and beneficial, they might be allowed at the discretion of the court (*Pothier, de Nantissement*, n. 61; *Dig. Lib.*, 13, tit. 7, b. 25; 1 *Domat*, b. 3, tit. 1, § 3, n. 20; *Ayliffe, Pand.*, b. 4, tit. 18, pp. 530, 531). But, in the language of Judge Story, the common law has not invested courts of justice with any such discretion, without the approbation of the pawnee, either express or implied.

In respect to voluntary deposits, the depositary is generally entitled to be reimbursed all the necessary expenses to which he has been subjected for the preservation of the deposit; and by the laws of some countries, the depositary has a lien for all such expenses upon the thing in deposit. And upon the same principle, it would at least seem reasonable that the pledgor of property should be made liable to pay for necessary expenses incurred by the pledgee in and about the property pledged. In some cases, the owner has been held to be personally liable to reimburse a party for services and expense incurred in taking care of his property, where the person who performed the service or incurred the expense would have no lien upon the property itself for the charges. Where a quantity of timber, placed in a dock on the bank

of a navigable river, was accidentally loosened and carried by the tide to a considerable distance, and left at low water upon a towing-path, a party finding it in that situation voluntarily conveyed it to a place of safety, beyond the reach of tide at high water, the Court of Common Pleas of England held that the party had no lien on the timber for the trouble and expense to which he may have put himself in the carriage of it. But the court intimated a very decided opinion that, in such a case, the party might maintain an action against the owner for a compensation (*Nicholson v. Chapman*, 2 *H. Black. R.*, 254). This is a good office, and meritorious of itself, and would seem to entitle the party to some reasonable recompense from the bounty, if not from the justice of the owner; yet the *legality* of the claim is not so apparent as in the case of necessary expenditures by the pledgee in and about the property in pledge, so long as it is properly retained by him. So that it may very safely be affirmed that this is among the obligations of the pledgor by reason of the contract of pledge. The principle may be regarded as pertinent to the point, that any one who has adopted and enjoyed the benefit of a consideration, is held to have impliedly promised to have requested and provided in due form (*Vide Lampleigh v. Braithwaite*, *Hobart's R.*, 105; 1 *Smith's Lead. Cases*, 5th ed., 135).

CHAPTER XLII.

THE RIGHTS OF THE PAWNOR OR PLEDGOR IN RESPECT TO THE PROPERTY PLEDGED — THE PLEDGOR'S RIGHT TO TRANSFER HIS INTEREST IN THE THING PLEDGED — HIS RIGHT TO REDEEM THE ARTICLE PLEDGED — THE EXTINGUISHMENT OF THE CONTRACT OF PLEDGE.

IN respect to the rights of the pledgor of the property pledged, it may be affirmed, in the first place, that he may sell or assign his interest in the pawn; and in such case the vendee or assignee will be substituted for the pledgor, and the pledgee will be obliged to allow him to redeem and to account with him for the pledge and its proceeds. If he refuses to recognize the rights of the vendee or assignee of the pledgor, an action at law will lie for damages,

or a bill in equity will be sustained to compel a redemption and account (*Story on Bailm.*, § 350). This doctrine is well settled by a large number of authorities.

In the State of South Carolina, the courts held, at an early day, that if the pawnor sell the property to a third person while it is in the pawnee's hands, and the pawnee refuse to give it up to the vendee on being tendered the amount of the debt for which it was pledged, the vendee may maintain trover against him (*Ratcliff v. Vance*, 2 *Const. Ct. R.*, 239). And the same principle was recognized in an early case before the old Supreme Court of the State of New York; wherein it was held that, to warrant trover, the plaintiff must show a present right of possession in the chattel; and if it appear to have been pledged by the plaintiff's vendor, before the sale, in order to secure a debt or duty to a third person, the plaintiff cannot recover unless he show such debt or duty to have been discharged, or that the operation of the pledge has ceased in some other way; obviously approving the doctrine, that it is competent for the pledgor to dispose of his general property in the thing pledged, when the vendee will stand in the tracks of his vendor before the sale, and must take the same measures to avail himself of the benefit of the residuary interest of the pledgor in the thing pledged (*Bush v. Lyon*, 9 *Cow. R.*, 52).

A comparatively late case in the State of Kentucky illustrates the same doctrine. A. pledged to B. certain bills of exchange for his indemnity, and afterward mortgaged the same bills of exchange, together with other property, to C.; the court held that an assignment was not necessary to constitute a valid pledge, and that the only interest transferred to the mortgagee was the surplus remaining after B.'s claim was satisfied; conceding, however, that it was competent for the pledgor to mortgage the articles pledged, subject to the rights of the pledgee (*Sanders v. Davis*, 13 *B. Mon. R.*, 432).

In an early case before the Supreme Judicial Court of Massachusetts it was held, where a mare in the stable of A., who had a lien for her keeping, was sold to B., and the vendor and B. wrote to inform A., of the sale, who thereupon held himself ready to deliver her to B., that the sale was valid, even as against an attachment by the vendor's creditor (*Truaxworth v. Moore*, 9 *Pick. R.*, 347).

Where a stranger comes into possession of the property pledged,

under a wrongful title from the pawnee, the owner has a right to consider the contract at an end for many purposes, and may therefore recover against the stranger, and hold him liable for damages (*Vide Martini v. Coles*, 1 *Maule & Selw. R.*, 140). But where there is an injury or conversion to or of the article pledged, by a stranger, for which an action lies both by the pledgor and pledgee, a recovery by either of them will oust the other of his right to recover; for there cannot be a double satisfaction. This is true as a general rule. But Judge Story very properly suggests that it deserves consideration whether the owner can, by his recovery of the pledge itself, or of damages for the conversion of it, against a stranger, oust the pledgee of his security in the pledge or its proceeds. And if the pledgee has recovered damages against a stranger only to the extent of his own lien, the learned judge suggests that it may further deserve consideration whether, upon suitable proofs, the owner may not also be entitled to recover for the surplus. However, he adds, these are propounded merely as matters open to further inquiry; but there would seem to be but little doubt as to the inclination of the learned author upon the subject, nor as to what will be the decision of the courts in respect to the matter whenever the question shall be properly presented (*Story on Bailm.*, § 352).

It may be affirmed in the second place, in respect to the rights of the pledgor, that he may redeem the property pledged; and inasmuch as he has never parted with the general title, he may *at law* redeem, even though he has not strictly complied with the condition of his contract of pledge. And it was expressly held by the English Court of Chancery, at a very early day, that where no time is given or specified for the redemption of the article pledged, the statute of limitations does not run against the pledgor, and he has time during life to redeem the property pledged, provided the pledgee has not in the meantime exercised his right to sell the pledge or foreclose the rights of the pledgor to redeem. The lord chancellor said: "It is something like the case of a remainderman, expectant on an estate for life or years, to whom a right to enter or bring an ejectment is given by the forfeiture of the tenant for life or years, yet he is not bound to do so; therefore, if he comes within his time after the remainder attached, it will be good; nor can the statute of limitations be insisted on against him for not coming within twenty years after his title accrued by forfeiture.

I will not say in general that there is a right to come into equity in every case to redeem pledged goods, yet there are cases where it may be" (*Kemp v. Westbrook*, 1 *Ves. R.*, 278). And the American cases are to the same purport. The late Chancellor Kent, the learned American commentator, many years ago laid down the rule that, where no time is fixed for redeeming a pledge, the pawnor may redeem at any time; and further, that the right of redemption survives on the death of the pledgor to his legal representatives against the pawnee and his representatives; declaring, however, that the pawnee may acquire absolute property in the pledge by requiring the pawnor to redeem and by his refusal (*Corley v. Lansing*, 2 *Caine's Cases in Er.*, 200).

And the Supreme Court of Mississippi, at an early day, recognized the same doctrine, holding that, where no time is mentioned, the pawnor has his lifetime to redeem in, unless the pawnee hasten the time by request; but that if, after request by the pawnee, the pawnor neglect to redeem in a reasonable time, the pawnee may sell the pledge. (*Perry v. Craig*, 3 *Miss. R.*, 516). And Judge Story, referring to this subject, observes: "If the pawnee does not choose to exercise his acknowledged right to sell, he still retains the property as a pledge, and, upon a tender of the debt, he may at any time be compelled to restore it; for prescription or the statute of limitations does not run against it. However, after a long lapse of time, if no claim for redemption is made, the right will be deemed extinguished, and the property will be held to belong absolutely to the pawnee. Under such circumstances, a court of equity will decline to entertain any suit for the purpose of a redemption. A like rule is adopted in the common law in cases of mortgages" (*Story on Bailm.*, § 346, referring to *Lockwood v. Ewen*, 2 *Atk. R.*, 303; *Mathews on Presumptive Evidence*, 20, 331; *Powell on Mortgages*, *Coventry & Rand's ed.*, *Coventry's note*, 401).

After "a long lapse of time," the authorities declare; and, as has been pertinently remarked, the term "a long lapse of time" is too uncertain to be of much practical value as a guide to pawnees who may wish to realize their security. And as the pawnee cannot be a purchaser, the long lapse of time referred to may not justify a sale of the property pledged without notice to the pledgor or his representatives. For without such notice, the pawnor does not lose his right to redeem even after the "lapse of a long time,"

unless at the time of making the contract of pledge the time was fixed or some act agreed upon, by the lapse or performance of which he was to be taken to have surrendered his right. The true rule upon the subject is doubtless laid down by Story, when he says: "The Roman law also has declared that prescription shall not run against the pawnee in respect to the pawnor, for the pawnee is always considered to hold his title as such until some other title supervenes. '*Neminem sibi ipsum causam possessionis mutare posse.*' But, nevertheless, where the title of the pawnee has remained undisturbed for a great length of time, it seems that such an extraordinary prescription may be insisted on as a bar for the sake of the repose of titles founded on long possession. But where no time of redemption is fixed by the contract, then upon general principles of law the pawnor has his whole life to redeem, unless he is previously quickened, as he may be, by the pawnee, through the instrumentality of a court of equity, or by notice *in pais* to the party" (*Story on Bailm.*, §§ 347, 348).

With respect to the question whether the right of the pledgor to redeem the pledge survives in case of his death, there have been authorities both ways; some holding that the right to redeem expired with the pawnor's life; others deciding that, if the pawnor dies without redeeming the pledge, the right to redeem survives to his personal representatives. The better opinion seems to be, that the right survives in case of the death of the pawnor, and that the right may be enforced by his personal representatives; and such is the current of the later authorities (*Vide Demandray v. Metcalf, Prec. Ch.*, 420; *Vanderzee v. Willis*, 3 *Bro. Ch. R.*, 21). The pledgor does not, clearly, lose his right to redeem the pledge by the death of the pledgee; in case of the death of the pledgee, the pledgor may redeem the pledge against his personal representatives (*Com. Dig., tit. Mortgage, B*).

Upon this subject it is said, in Bacon's Abridgment: "There is a great difference between a pawn and a mortgage of lands; for if goods be pawned without mention of time for redemption, they may be redeemed after the death of the pawnbroker; * * * when goods are pawned, the pawnbroker hath but a qualified property; the absolute ownership is in the person that deposits them; and this property cannot be extended beyond the intent for which it was created, and that is only for securing the money lent; for should the property be thus extended, it would be to the injury of him

that has the absolute ownership. Now, the intent of the parties in not limiting a time of redemption was plainly in case of the pledgor, and therefore the time of redemption must be during his life; and he cannot be confined to the life of the pawnbroker, for that might fall more to the disadvantage of the person pledging than if a time had been limited; and there are no absolute words to evidence such a rigorous construction, contrary to the design of the parties; but if the pledgor doth not redeem during his own life, his executors cannot redeem, for then the words and intent both agree to make an absolute property to the pawnbroker" (*Bac. Abr., tit. Bailment, B*). This is regarded, in the main, as trustworthy authority; but the last clause in the paragraph quoted is not generally followed at the present day.

Where there is a specified time, by the contract, in which the redemption is to be made, the same authority lays down a different rule. He says: "But if time be set for the redemption of a pledge, and before the time the pledgor dies, his executors may redeem it, and it shall be assets in their hands; for when there is a time limited, then by the express words the party hath till the time appointed; and the time appointed is indefinite, and not during the life of the pledgor, and, therefore, if he dies, his executors shall redeem; and, therefore, the death of either party cannot prejudice" (*Bac. Abr., tit. Bailment, B*).

A case was decided by Lord Hardwicke, in 1745, wherein he held that a deposit of chattels, as a pledge, upon condition not to sell them until failure of payment *on a certain day*, was a transaction that might be affected by the statutes of limitation (*Gage v. Bulkeley, Ridg. Cases Temp., Hardwicke, 278*). But where there is no certain day for redemption, and the pawn remains with the pawnee, then, as before stated, the statute would not operate; and yet, in that case, evidence in support of the presumption that the pawnor had abandoned his right to the pawn might, nevertheless, be given.

Judge Story observes that "the pledgor is not ordinarily barred of his right to redeem the pledge, so long as the pledgee may be presumed to hold it as a pledge. * * * If a very long period has elapsed, and the pledge has continued in the possession of the pledgee, it affords a presumption of the abandonment of it by the pledgor; and if any presumption of an extinguishment of the debt

arises in such case, it is an extinguishment by receiving the pledge in satisfaction" (*Story on Bailm.*, § 362).

The following case of considerable interest came before the Supreme Court of the State of Vermont, involving the right of a pawnor to redeem the article pawned: R., for himself and P., contracted with F. for the occupation of certain premises owned by F., and gave to him a written agreement to cut the hay on the premises, put it in a barn there, and that it should remain F.'s property; but if R. should pay F. twelve dollars before October 1, then the hay was to become the property of R. The court held that the transaction was a pledge of the hay to secure the twelve dollars, and that R. and P. had a right to redeem until F. had proceeded in chancery to foreclose, or had sold the hay in the manner prescribed by law. The court further held that the assignee of F., who took the hay with notice that R. had some right to it, was put upon inquiry, and would have found, if he had inquired, that P. was jointly interested. Therefore, P. had a right peaceably to take the hay from the assignee's possession, after tendering him what remained unpaid of the sum secured by the pledge (*Taggart v. Packard*, 39 Vt. R., 628).

In this connection, it may be regarded as cognate to the subject of this chapter to examine, in the third place, the manner in which the contract of pledge may be extinguished. And here, little else is necessary but to insert the substance of what Judge Story has compiled from the elementary treatises upon the subject, and published in his excellent Commentaries on the Law of Bailments. The points are given by him, and presented in a very few sentences, from which it appears that an extinguishment of a pawn or pledge may arise in several ways.

1. The pledge may be extinguished by the full payment of the debt, or the discharge of the other engagements, for which the pledge was given. For this he cites 1 *Domat*, b. 3, tit. 1, § 7, art. 1; *Pothier, Pand.*, lib. 20, tit. 6, § 1, l. 1-5; *Ayliffe, Pand.*, b. 4, ch. 18, pp. 536, 537. *Si dominus solverit pecuniam, pignus quoque perimitur. Dig. lib. 20, tit. 1, l. 13, § 2.* And to this it may be added, that the courts have held that the lien of a pledge is destroyed by a tender of the amount due which the pledge was made to secure. This was so declared in a recent case decided by the Superior Court of the city of New York.

Robertson, J., who delivered the opinion of the court, among

other things said: "It was finally settled in *Kortright v. Cady* (21 *N. Y. Rep.*, 343), in the Court of Appeals, that a tender of an amount due on a mortgage on land, even after the law-day, if refused, destroyed the lien of it on the land. By giving the mortgagor the right to redeem, by rendering him only liable for the amount to be paid, in case of his conversion of the property, and making the mortgagee liable for any sales beyond the amount of his mortgage (*Hinman v. Judson*, *Chenter v. Stevens*, *ubi sup.*), it would seem to have become a mere security for money. It is true that in the case of *Butler v. Miller* (1 *Comst.*, 500), the judge who delivered the opinion of the court notices the distinction between mortgages of real and personal estate, and states that the latter is a sale, and operates to transfer the whole legal title of the thing mortgaged to the mortgagee, subject only to be defeated by a full performance of the condition. It was not necessary for the decision of that case; but some respect is due to even an *obiter dictum* in the court of highest resort when relying on distinctions so drawn. It has been held that, after forfeiture, no tender can revest the title in the mortgagor, and even that acceptance of part is no waiver (*Patchin v. Pierce*, 12 *Wend.*, 61). But there are authorities to the contrary (*Jenkins v. Jones*, 2 *Gifford*, 99). Such distinction, however, between mortgages of real and personal estate cannot prevail in case of a pledge, which is settled to be a mere security, conferring only a special property in the property pledged (*Brownell v. Hawkins*, *ubi sup.*), for any fall of value in which, after a tender, the pledgee is responsible (*Griswold v. Jackson*, 2 *Edw.*, 461), which would not be the case if a bill to redeem were necessary. The interest of the pledgee is in fact a mere lien, like a mortgage of land, and should be relieved by the same process. The reasoning in the case of *Kortright v. Cady*, before cited, is equally applicable to pledges, and must govern this case" (*Haskins v. Kelly*, 1 *Rob. R.*, 160, 173, 174).

It thus clearly appears, upon competent authority, that the first way assigned by Judge Story by which a contract of pledge may be extinguished, should be amended so as to make it, that the pledge may be extinguished by the full payment of the debt or a tender of the amount due, or the discharge of the other engagements, or an offer and readiness to discharge the other engagements, for which the pledge was given.

2. The pledge may be extinguished by a satisfaction of the

debt in any other mode, either in fact or by operation of law; as, for instance, by receiving other goods in payment or discharge of the debt. *Item liberatur pignus, sive solutum est debitum, sive eo nomine satisfactum est.* The authorities cited upon this point by Judge Story are: 1 *Domat*, b. 3, tit. 1, § 7, art. 4; *Pothier, Pand.*, lib. 20, tit. 6, § 4, l. 17, 18; *Ayliffe, Pand.*, b. 4, tit. 18, pp. 536, 537; *Dig.*, lib. 20, tit. 6, l. 6.

3. The pledge may be extinguished by taking a higher or different security for the debt (as, for example, a bond or obligation for a promissory note), without any agreement that the pledge shall be retained therefor. This, in the Roman and foreign law, is called a *Novation*; and, as the original debt is thereby extinguished, the contract of pledge, which is but an accessory, is also extinguished. *Novata autem debiti obligatio pignus perimit nisi convenit, ut pignus repetatur.* But as no revocation has the effect to extinguish a prior debt, unless such is the intention of the parties, it follows that a mere change of the security will not extinguish the right to the pledge, without the express or implied assent of both parties. For authority on this point Judge Story cites 1 *Domat*, b. 3, tit. 7, § 7, art. 2, 4; *Ib.*, b. 4, tit. 3, § 1, art. 1 to 5; *Pothier, Pand.*, lib. 20, tit. 6, § 1, l. 6, 7; *Ayliffe, Pand.*, b. 4, tit. 18, pp. 536, 537; *Dig.*, lib. B, tit. 7, l. 11, § 1.

A case bearing upon this point may also be referred to, which was lately decided by the Supreme Court of California. Plaintiff and Templeton were severally creditors of Thompson. Templeton held certain goods of Thompson in pledge as security for his indebtedness, the value of which exceeded the claims of both Templeton and the plaintiff. Under these circumstances, an arrangement was made between the plaintiff and Templeton, by which the plaintiff guaranteed to Templeton the payment of his debt, and received from him an assignment and the possession of the goods, in pledge to secure the payment of the debts of both plaintiff and Templeton. Thompson was not present at the time of the arrangement between the plaintiff and Templeton, but subsequently expressed his gratification at the arrangement. The court held that Templeton lost his lien on the goods, as pledgee, by surrendering them to plaintiff and taking his guarantee for his debt (*Treadwell v. Davis*, 34 *Cal. R.*, 601).

4. The pledge will be extinguished by whatever, by operation

of law, extinguishes the debt. For example, if the pledgee brings a suit for the debt against the pledgor, and the pledgor obtains a judgment in his favor, in such a way as that it bars any future recovery of the debt, that will extinguish the right of the pledge. To this point, Judge Story cites: 1 *Domat*, b. 3, tit. 7, § 1, art. 3; *Pothier, Pand.*, lib. 20, tit. 6, § 1, l. 8.

5. If the right to the debt is barred by prescription, it is said in the Roman law that the right to the pledge is also gone (1 *Domat*, b. 3, tit. 7, § 1, art. 9; *Pothier, Pand.*, lib. 20, tit. 6, § 5, l. 37-40). And Judge Story adds: "This is equally true in the common law, where, from the length of time there arises a presumption of the payment or discharge of the debt. But if there is merely a positive bar by the statute of limitations against a personal action for the debt, it may deserve consideration, how far this will oust the party of his right to retain the pledge towards satisfaction of the debt for the possession of the pledge, may be the very reason why the pledgee has omitted to bring a personal suit for the debt within the prescribed time. * * * And the continued possession of the pledgor, being founded upon the presumed consent of the pledgee, affords, under such circumstances, proof of the non-extinguishment of the debt, although the statute of limitations may present a bar to a mere personal action. * * * If, then, the statute of limitations has run against the debt as a personal claim, and the pledgor seeks to recover back the pledge, why may not the pledgor avail himself of the protection of the same statute to bar such suit? If the pledgor insist that it is still a pledge, why may not the other party avail himself of all the fair presumptions arising in the case that the debt has not been paid, or that the pledge has been deemed a satisfaction of it? Some of the adjudged cases seem silently to admit the existence of a right in the pledgor over the pledge, notwithstanding the lapse of a period exceeding that of the statute of limitations for a personal suit for the debt (*Kemp v. Westbrook*, 1 *Ves. R.*, 278; *Gage v. Bulkley*, *Ridg. Cas. Temp. Hard.*, 278; *Yelv. R.*, 178, 179). This, however, must be considered, in the absence of some direct authority, as a point merely propounded for further consideration."

6. The pledge may be regarded as extinguished when the thing perishes. *Sicut re corporali extinctâ, ita et resufructu extincto, pignus hypothecave perit*, is the language of the Roman law. If it undergoes any permanent and essential transmutation, it would

seem, by the Roman law, that the right to it, under some circumstances, would be extinguished. For example, if a wood should be delivered as a pledge, and a ship should be afterward built of the trees, the ship would not be pledged, unless there was an express stipulation that the trees, and whatever should be constructed out of them, should be equally subject to the pledge. This example, as suggested by Judge Story, ought not, perhaps, to be deemed the foundation of any general rule, since, in the building of a ship, various other materials besides the trees must have been used in the construction. But this is the example used by the Roman law to illustrate the rule (*Dig., lib. 13, tit. 7, ch. 18, § 3*).

Judge Story continues: "Let us suppose a gold vase to be pledged and then melted down into a bar of gold, or a bar of gold to be wrought into a vase without the use of any other materials, and the question might then present itself in a very different aspect. However this may be, it seems certain that at the common law the pledge is not thereby extinguished (*Pothier, Pand., lib. 20, tit. 6, n. 12, 13; Domat, b. 3, tit. 1, § 7, art. 7; Ayliffe, Pand., b. 4, tit. 18, pp. 536, 537*). As far as the property can be traced it will still be held as a pledge by the common law, whatever transmutation it may have undergone without the assent of the pledgee" (*Taylor v. Plumm, 3 Maule & Selw., 562; Story on Agency, §§ 224, 229-231*).

7. The pledge may also be extinguished by any act of the pledgee which amounts to a release or waiver of the same. This may be by a release, in solemn form, of the debt, or by any other discharge of the right to the pledge. But a release of a part or of an undivided portion of the things pawned will operate as an extinguishment only *pro tanto* (*Pothier, Pand., lib. 2, tit. 6 and 4, l. 14; Macomber v. Parker, 14 Pick. R., 497, 507*).

If the pledgee yields up the possession of the pledge to the pledgor, or consents that the latter shall alienate it or pledge it to another person, either of these acts will amount to a waiver of his right to the pledge. As authority for this last proposition, Judge Story cites *Homes v. Crane* (2 *Pick. R.*, 607); *Runyan v. Mercereau* (11 *Johns. R.*, 589); *Reeves v. Capper* (5 *Bing. New Cases*, 136); *Ryall v. Rolle* (1 *Atk. R.*, 165.)

This summary embraces all the various ways, noticed by Judge Story, by which a pledge may be extinguished; and, doubtless, no case could be supposed which could not be brought within one or

other of these divisions. In respect to this summary, the learned author says: "These formal divisions of the modes of extinguishing the right to the pledge have been taken from the Roman law, in which they are set down with minute accuracy. The common law, however, is precisely the same as to all the principles which govern them, with the exceptions which have been incidentally suggested. Indeed, the whole doctrine of extinguishment is resolvable into the very first elements of justice, and is founded upon the express or implied intention of the parties to extinguish the pledge, or upon a virtual extinguishment by the necessary operation of law" (*Vide Story on Bailm.*, §§ 359-365).

Judge Story closes his observations, upon the point under consideration, with a notice of a few peculiarities in the local jurisprudence of Massachusetts, among which was a reference to the case wherein it was held that if a pawnee causes the goods which are pawned to be attached in a personal suit against the pawnor for the very debt for which they are pledged, his lien or right to the pledge is waived or extinguished (*Swett v. Brown*, 5 *Pick. R.*, 178). But this doctrine, the learned author observes, if it is admitted to be fully settled, is to be restricted to the very case stated; for an attachment of the same property by the pawnee, for the security of other debts due to him by the pledgor, will not be a waiver or extinguishment of the lien or right of the pledgee to the pledge, if, at the time of such attachment, he gives notice to the officer that he means also to insist on such lien and pledge, and by requiring the officer to maintain the possession accordingly for him (*Morehead v. Newell*, 14 *Pick. R.*, 332, 335; *Whitaker v. Sumner*, 20 *ib.*, 399, 406). And the learned judge adds: "The effect of these decisions, therefore, supposing them to be sustained to their full extent, may be that the writ of attachment, in all cases of pledge, will be but a writ of *capias* in favor of the creditor, and that, however inadequate the pledge may be as a security, he must abandon it before he can secure himself by any attachment of the property of his debtor. What would be the effect of a levy of the execution, which should issue upon a judgment in favor of the creditor for the debt, upon the pledge or other property of the debtor, does not appear to be decided. Nor, indeed, does it appear to have been decided what would be the effect of a personal suit brought by the creditor while he retains the pledge" (*Story on Bailm.*, § 366). The subject of this last suggestion will be examined in a

- subsequent chapter. And perhaps it may not be regarded as impertinent here to remark, that it would not seem very important whether the rights of a pledgee are extinguished, or not, by an attachment of the goods pledged in a suit instituted to recover the debt secured by the pledge; for the reason that it could make no difference to the pledgor whether the property was held by virtue of the contract of pledge or the attachment. In either case they are held for the debt for which they were given in pledge. The general rule, however, is that a lien is destroyed if the party entitled to it gives up his right to the possession of the thing on which he has his lien; and this doctrine would be applicable in a case of pledge. If the pledgee allows the officer to seize the property; or, what is more, if he turns out the property in pledge to the officer, to be taken on an attachment or execution, the officer must needs take the possession, which is essential to the continuance of the pledge, from the pledgee, and thereby the pledge might be extinguished. But if, in the end, the property goes to pay or satisfy the debt which it was pledged to secure, it would seem to be not very important whether the rights of the pledgee, as such, were extinguished by the seizure upon attachment or not (*Vide Jacobs v. Latour*, 5 *Bing. R.*, 130; *S. C.*, 15 *Eng. C. L. R.*, 388).

On this point, the Supreme Court of the State of Tennessee has recently held that a lien upon property pledged may be waived, by voluntary surrender of the pledge with intent to abandon the lien, or by agreeing that it may be attached at the suit of a third person, but not by the pledgee's causing an attachment to be made on the property pledged to enforce his lien and as a mode of sale; and this would seem to be a very sensible doctrine (*Arendale v. Morgan*, 5 *Sneed's R.*, 703).

CHAPTER XLIII.

THE PLEDGEE'S PROPERTY IN THE PLEDGE OR PAWN — RIGHTS OF THE PLEDGEE IN RESPECT TO THE PLEDGE BEFORE IT IS REQUIRED TO BE REDEEMED.

It has been shown in a previous chapter that the general property in a pledge remains in the pledgor. It follows, therefore, that by virtue of the contract of pawn or pledge the pawnee or pledgee acquires only a special or qualified property in the thing pledged. Blackstone says: "In case of goods pledged or pawned upon condition, either to repay money or otherwise, both the pledgor and the pledgee have a qualified, but neither of them an absolute, property in them; the pledgee's property is conditional, and depends upon the performance of the condition of repayment, etc.; and so, too, is that of the pledgor, which depends upon its non-performance" (2 *Black. Com.*, 396). And, again, the same learned author says: "If a pawnbroker receives plate or jewels, as a pledge or security for the repayment of money lent thereon at a day certain, he has them upon an express contract or condition to restore them, if the pledgor performs his part by redeeming them in due time. * * * In all these instances there is a special qualified property transferred from the bailor to the bailee, together with the possession. It is not an absolute property, because of his contract for restitution; the bailor having still left in him the right to a *chose* in action, grounded upon such contract" (2 *Black. Com.*, 452, 453). But all the authorities agree that in the case of a pledge, a special property, and a special property only, passes to the pledgee; the general property remaining in the pledgor.

The doctrine was laid down, upon numerous authorities cited, in a case before the present Supreme Court of the State of New York, that a pawnee of goods does not acquire an absolute title simply by a failure of the pawnor to pay the debt or redeem the property at the time specified; that the pledgee's interest is a special property to retain the goods for his security; and that there is no forfeiture until the pawnor's rights are foreclosed (*Brownell v. Hawkins*, 4 *Barb. R.*, 491).

In a recent case in the State of Kentucky, it was held that the deposit of bills of lading for cotton, without assignment or other

writing, and without actual delivery of the cotton, is a sufficient transfer to pledge the cotton to the bank as security for the payment of money advanced by the bank upon the faith of the security so given, and the *lien* acquired by the bank is paramount to a subsequent attachment. Here the interest of the pledgee is called that of a *lien* (*Pettit v. First, etc., Bank, 4 Bush's R., 33*).

In a late case decided by the Superior Court of the city of New York, it was held that the mere deposit of promissory notes by a holder, before maturity, with a creditor, without indorsements as collateral security, will not divest the pledgor of his legal ownership, but will only vest in the creditor, as pledgee, a contingent equitable interest in the notes, or the proceeds thereof, in case the debt should not be paid, subject to a prior equity then existing in favor of the maker against the pledgor. This, though called an equitable interest, is virtually a special property in the notes which were pledged as security for the debt (*Snow v. Fourth, etc., Bank, 7 Rob. R., 479*).

The same court, at an earlier day, held that where a certificate of stock is delivered to a creditor as collateral security for an existing debt, the transaction is a pledge, and not a mortgage of stock; and the legal title passes to the pledgee. This is different from the general holding of the courts upon the subject, and yet it is in accordance with the language of the judge who delivered the opinion of the court in this case.

Campbell, J., in his opinion, said: "It is said that a mortgage passes the title to the mortgagee, subject to be defeated on payment of the mortgage debt; and it is admitted that, in case of forfeiture by non-payment on the day, the mortgagor may come into a court of equity for the purpose of redeeming. But it is insisted that in case of a pledge, though the possession passes to the pledgee, the title remains in the pledgor, and in case of non-payment the pledgee must bring his action at law for the redemption of the article pledged, or rather for its return, or for compensation in damages. Admitting the transaction in this case, according to the ruling in *Wilson v. Little* (2 Comst., 443), *S. C.* (1 Sand., *S. C. R.*, 351), was a pledge, and not a mortgage of the stock, yet though termed a pledge, the legal title passed, and the same reason might exist, therefore, for coming into equity to redeem. In that case, and in that of *Allen v. Dykers* (3 Hill, 593), which were both actions at law, the plaintiff did not seek a return of the stock, but

compensation in damages. In *Kemp v. Westbrook* (1 *Vesey, Sr.*, 278), Lord Hardwicke says: 'I will not say in general that there is a right to come into equity in every case to redeem pledged goods, yet there are cases when it may be; as the pawnee of stock is not bound to bring a bill of foreclosure of the equity of redemption of the stock, but may sell it, and notwithstanding the mortgagor may bring a bill here for an account of what is due, and to have a transfer to him.'

"It would seem that in case of pledging stock, where the legal title passes, the remedy would be the same as upon mortgages. Indeed, the distinction seems to be only in name in this respect, though it may be considered usual, as was the case in *Wilson v. Little*, where the action was for the recovery of damages, and not for a retransfer" (*Hasbrouck v. Vandervoort*, 4 *Sand. R.*, 74, 78, 79). It will be observed that the judge, in his opinion, *assumes* that when *stock* is pledged, the legal title passes to the pledgee, contrary to the rule in ordinary cases of pledging. In this case a certificate of stock was pledged and a power of attorney was delivered to the pledgee with the certificate, authorizing the pledgee to transfer the title for the purpose of securing the debt, and nothing else. It has been held that an absolute assignment or transfer of a chose in action may be shown to be simply a pledge, but in such a case it is obvious that upon the *face* of the transaction it is a sale and not a pledge; and hence, that it would be necessary to come into a court of equity to change the *status* of the parties. But the general rule certainly is, that in an ordinary pledge the legal title remains in the pledgor, and only a *special* property passes to the pledgee (*vide M. C. Lemore v. Hawkins*, 46 *Miss. R.*, 715).

In a late case arising in California, heretofore referred to upon another point, the court declared that in the case at bar the relation of the plaintiff to the goods in suit was that of a *pledgee* having a *lien* on such goods to secure the payment of his debt. But under the circumstances of the case he was entitled to recover in the action; and that his right of recovery was not limited to his interest only, but extended to the whole value of the goods. It was not claimed, however, that the plaintiff had any rights in the case, which might not appertain to a party having simply a special property in the thing pledged (*Treadwell v. Davis*, 34 *Cal. R.*, 601).

A case in the New York Court of Appeals, also hereinbefore

referred to upon another point, holds that the transfer of the legal title is not in any case inconsistent with a pledge, if the debtor has a right to the restoration of the property on payment of the debt at any time, although after it falls due. And it was declared, in plain terms, that a transaction may be a pledge instead of a mortgage, although the *legal title* pass to the creditor. This was a case of pledging capital stock of a corporate company. And the late Samuel Beardsley, one of the closest and most discriminating lawyers that ever graced the New York bar, and who had previously acted as chief justice of the State, was the counsel for the appellants, and argued that the transaction was not a pledge of the stock, for the reason that the legal title to it vested in the appellants; assuming that, where personal things are *pledged* for the payment of a debt, the general property and legal title always remains in the pledgor, and that in *all* cases where the legal title is transferred to the creditor, the transaction is a mortgage and not a pledge. But the court said that this was not invariably true, and held as before indicated; and the rule was laid down that the general property which the pledgor is said usually to retain is nothing more than a legal right to the restoration of the thing pledged on payment of the debt. This, however, does not necessarily conflict with the fact that the rights of the pledgee in the property are only those of a special bailee having a *special* property in the articles pledged (*Wilson v. Little*, 2 N. Y. R., 443).

As before stated, the courts have held that a bill of sale, absolute on its face, may be shown to have been intended as a pledge by other writings and acts of the parties, and even by parol evidence, and thereupon the transaction will be deemed and treated as a pledge. In such case the pledgee *ostensibly* holds the *general* property in the thing, while, in *fact*, he only holds a *special* property in the property transferred to him by the owner.

But the pledgee of property acquires not only nothing but a *special* property in the article pledged, but this special property extends only to the interest which the pledgor had in the thing pawned. And if the pawnor had *no* title to the property pledged, the pledgee would acquire no lien upon the property as against the owner (*Duell v. Cudlipp*, 1 *Hilton's R.*, 166).

And the Supreme Court of Ohio lately held, where M., who had fraudulently acquired certain stock, assigned it to a bank as col-

lateral security for a pre-existing debt not contracted on the faith of the security, that the bank's title to the stock was no better than that of M., and must yield to the title of the party from whom the stock was fraudulently obtained (*Cleveland v. State Bank*, 16 *Ohio St. R.*, 236).

So, also, it has been decided by the Court of Appeals of the State of New York that a pledge obtained by false representations of the creditor, though unredeemed by the debtor, vests no interest in the pledgee. This is upon the well recognized principle that a contract obtained by fraud, though perfect in form, is void in law. No man can safely rest on a title acquired through his own deliberate wrong; and this doctrine is held to be applicable to contracts of pledge, as well as to every other mutual engagement (*Mead v. Brown*, 32 *N. Y. R.*, 275).

But in the case of a fair and *bona fide* pledge, as the pledgee has a special property in the article pledged, and until the fulfillment of the condition, has a right also to its exclusive possession, he enjoys certain well defined and well recognized rights in respect to the pledge, before he may be called upon to enforce his claim as pledgee to obtain payment of the debt which it was made to secure.

If the owner of the property put in pledge should wrongfully repossess himself of the pawn, the pawnee may maintain a suit for the restitution of the thing itself, or for damages at his election. Or if it should be taken from him by a stranger, he may, in like manner, bring his action against a stranger for the property or its value (*Story on Bailm.*, § 303, and *authorities cited*). In a suit for damages against a stranger who wrongfully took the property pledged, the pledgee may recover the full value of the thing, although it is pledged to him for less, as the pledgee will be answerable over to the owner for the excess. But the rule would be different where the action was against the owner as pledgor. In that case he could only recover a sum sufficient to cover the amount for which it was given as security (*Lyle v. Barker*, 5 *Binn. R.*, 457; *Story on Bailm.*, § 303). And the pawnee may maintain trover or trespass in respect to the thing pledged, which the pledgor cannot do, because the pledgee has the right both of property and of possession, while the pledgor has the right of property only (*Ward v. Macaulay*, 4 *T. R.*, 489; *Blewam v. Saunders*, 4 *Barnw. & Cres. R.*, 941). But if the pledgee should make impro-

per application of the pawn or pledge, as by selling it or giving it away absolutely, the pawnor would doubtless be held to have a right of action against the person in possession, the pledgee having by his own wrongful act determined the contract. This may be affirmed both upon principle and authority (*Vide Pickering v. Busk*, 15 *East's R.*, 38).

Whether or not the pawnee is entitled to use the pawn is a matter which greatly depends upon circumstances. With respect to this, Mr. Justice Story deduces the following rules from the common-law authorities, and from the presumed intentions of the pawnor: (1.) If the pawn is of such a nature that the due preservation of it requires some use, then such use is not only justifiable, but is indispensable to the faithful discharge of the duty of the pawnee (*Jones on Bailm.*, 81). (2.) If the pawn is of such a nature that it will be worse for the use, such, for instance, as the wearing of clothes that are deposited, then the use is prohibited to the pawnee (*Jones on Bailm.*, 81). (3.) If the pawn is of such a nature that the keeping is a charge to the pawnee, as if it is a cow or a horse, then the pawnee may milk the cow and use the milk, and ride the horse by way of recompense (as it is said) for the keeping. On this point the learned author refers to several authorities, and, among others, to 2 *Kent's Com.* (§ 40, pp. 578, 579, 4th ed.), observing that "Mr. Chancellor Kent thinks the profits should belong to the pawnor and be deducted from the debt." He also refers to *Moses v. Cochrane* (*Owen's R.*, 123, 124), where Coke, Warburton and Daniel, Justices, take a different view, holding that, in the case of the cow in particular, the pawnee might take the milk and use it as the owner would. (4.) If the use will be beneficial to the pawn, or it is indifferent, then it seems the pawnee may use it; as if the pawn is of a setting dog or of books, which will not be injured by a moderate use (*Jones on Bailm.*, 81; *vide Moses v. Cochrane*, *Owen's R.*, 123, 124; *Thompson v. Patrick*, 4 *Watt's R.*, 414). (5.) If the use of the pawn by the pawnee will be without injury, and yet the pawn will thereby be exposed to extraordinary perils, then the use is impliedly interdicted (*Story on Bailm.*, §§ 329, 330).

The position of Judge Story, that the use of the pawn is forbidden in the case last supposed, is contrary to the opinion of Sir William Jones, recognized as eminent authority, and much quoted by Judge Story. He observes that "if pawns cannot be hurt by being worn,

they may be used, but at the peril of the pledgee; as if chains of gold, ear-rings or bracelets be left in pawn with a lady, and she wears them at a public place, and be robbed of them on her return, she must make them good. 'If she keep them in a bag,' says a learned and respectable writer, 'and they are *stolen*, she shall not be charged' (*Law of Nisi Prius*, 32). But the bag could hardly be taken *privately and quietly* without her omission of *ordinary* diligence; and the manner in which Lord Holt puts the case establishes my system, and confirms the answer just offered to the case from the Year-book; for 'if she keep the jewels,' says he, '*locked up* in her cabinet, and her cabinet be *broken open* and the jewels taken thence she will not be answerable,' *Lord Raymond*, 917" (*Jones on Bailm.*, 81, 82).

With respect to these remarks of Sir William Jones and those he quotes from Buller's *Nisi Prius*, Judge Story observes: "It may well be doubted whether there is any foundation for the doctrine which is affirmed both by Mr. Justice Buller and by Sir William Jones, that in case of a deposit of things which are not hurt by use, the depositary may, at his peril, use them. The language of the authority, which is principally relied on for its support, does not, when properly construed, justify any such conclusion. In *Coggs v. Bernard* (2 *Ld. Raymond*, 909, 916), Lord Holt says: 'If the pawn be such as it will be worse for using, the pawnee cannot use it, as clothes, etc. But if it be such as will never be worse, as if jewels for the purpose were pawned to a lady, she might use them. But then she must do it at her own peril. For whereas, if she keeps them locked up in her cabinet, if her cabinet is broken open and the jewels taken from thence, she would be excused; if she wears them abroad, and is there robbed, she will be answerable. And the reason is, because the pawn is in the nature of a deposit, and as such is not liable to be used.' Now, the reason here given, so far from proving that the pledgee may lawfully use the jewels, expressly negatives any such right. And, unless the contrary is expressly agreed, it may fairly be presumed that the owner of such a pawn would not assent to the jewels being used as a personal ornament, and thereby be exposed to unnecessary and extraordinary perils" (*Story on Bailm.*, § 330). The position of Justice Story is doubtless correct. It may be suggested, perhaps, that if the article pawned was a watch, in running order, that the pledgee would be justified in keeping it wound up and in use; and possibly he might

carry it about his person, especially if the article was not thereby more exposed to injury or loss than though it was kept in ordinary deposit. Very likely, however, that a watch would be the better for using, rather than remaining run down and idle; and if so, it would then come within the first subdivision suggested, by which the use will be justifiable.

Judge Story goes on further to remark: "The Roman law and French law do not, in respect to the right of using pawns, seem materially to differ from the common law, unless there is an exception furnished by the rule thereof that, where the pawn is used (as if a cow is milked) and a profit is obtained thereby, the pawnee shall be bound to account for the profits, deducting all expenses for the keeping (*Jones on Bailm.*, 82; *Pothier, Traité de Dépot*, n. 47; *Pothier, de Nantissement*, n. 23, 35, 36; 1 *Domat*, b. 3, tit. 1, § 4, art. 6; *Dig., lib. 20, tit. 1, l. 21*, § 2; *Pothier, Pand., lib. 20, tit. 1, n. 26*; *Code of Louisiana of 1825*, art. 3135). By the law of Louisiana the fruits of the pledge are deemed to make a part of it, and the pledgee cannot appropriate them to his own use, but is bound to account for them (*Code of Louisiana of 1825*, art. 3135). Mr. Chancellor Kent seems to think that the common law is, or at least ought to be, the same (2 *Kent's Com.*, § 40, pp. 578, 579, 4th ed.) And his doctrine certainly carries with it a most persuasive equity, although, as we have seen, it seems inconsistent with the rule laid down in some of the authorities" (*Story on Bailm.*, § 331, citing, under last proposition *Moses v. Cochrane*, *Owens R.*, 123, 124).

Besides the right to the possession of the pawn and to the repayment of his advances, the pawnee is very commonly, though, it is said, not necessarily, entitled to interest upon the loan, so long as it remains unpaid, and detains the pledge as security in the mean time. Upon this point a usage of trade raises a question which seems never to have been formally decided. It is common for pawnbrokers to keep pledges for two or three months after forfeiture, before sending them to sale, and as an accommodation to pawnors to allow them that additional time for redemption; at least, this is the custom in England. In such cases it has sometimes been doubted whether they are entitled to charge pawnbroker's interest. But under the English pawnbroker's act, and by the general principles of equity, it is clear that they are entitled to charge such interest. Unless the pawn was perishable, it would

be a benefit to the pawnor to have it kept unsold, so that it ought not to lie in his mouth to say that he has a right to take the benefit without paying for it. But this question may depend much upon the provisions of the statute, where a statute exists on the subject, and the statutes upon the subject of pawns or pledges will be noticed hereafter.

If the party who pledged the goods was not the owner of them, the pawnee has the right to deliver them to the real owner, unless the pledgor has a special property in them, which he is entitled, under the circumstances, to assert against the owner. And in an action against the pawnee for the goods by the pledgor in the case supposed, the pledgee may defend himself by showing that he has delivered over the goods to the true owner (*Ogle v. Atkinson*, 1 *Marsh. R.*, 323). And if the pledgor holds the pledge merely as a pledge from the owner, the second pledgee may discharge himself from the obligation to the owner by delivering it up to his pledgor at any time before such owner offers to redeem. This is the general rule in such cases, subject, however, to some exceptions founded upon the public policy of protecting *bona fide* purchasers under peculiar circumstances (*Story on Bailm.*, § 340).

An exception to the general rule is found in an early case before the Supreme Judicial Court of Massachusetts. The certificates of the stock of a company were, by a vote of the company, made transferable by indorsing on them the name of him to whom they issued; and one of the company who held such certificates, indorsed and pledged them as collateral security for a debt, which was afterward paid from his funds by his agent, who received the certificates and afterward pledged them, so indorsed, as security for his own debt. The court held that the last pawnee, who knew not the pawnor's defect of title, might hold them, as against the original owner, till the debt for which they were pledged to him should be paid (*Jarvis v. Rogers*, 13 *Mass. R.*, 105).

Where a bill of lading may be and has been pledged by the consignee of the goods as a security for his own debt, the legal right to the possession passes to the pledgee. But the right to stop them *in transitu*, in case the consignee should become insolvent, is not absolutely defeated, as it is in the case of a sale of the bill of lading by the consignee, for the vendor may still resume his interest in them, subject to the rights of the pledgee, and will have a right, at least in equity, to the residue which may remain after

satisfying the pledgee's claim. And, further, if the goods comprised within the bill of lading be pledged along with other goods belonging to the pledgor himself, the vendee will have a right to have all the pledgor's own goods appropriated to the discharge of the pledgee's claim, before any of the goods comprised within the bill of lading pass. This doctrine was expressly laid down in a well considered English case. It appeared that L. & Company had given bills for oil purchased of the plaintiffs, and had pledged the bills of lading with H. & Company, as security for further advances. The vendee's became bankrupt, and their bills were dishonored. At the time of the bankruptcy, H. & Company held, besides the bills of lading, goods of L. & Company to the value of £9,961 1s 7d. The court held that the plaintiffs who had given notice to stop *in transitu*, had a right to insist upon the proceeds of L. & Company's own goods being first applied to the discharge of H.'s lien, because the transfer of the property and right of possession to H. were in the nature of a pledge only. That being so, the plaintiff Westzinthus, by his attempted stoppage *in transitu*, acquired a right to the goods in equity, subject to H.'s lien thereon, as against L. & Company's assignees, and as the goods proved sufficient to satisfy the lien, the plaintiff received the entire proceeds of the oils he had sold to the bankrupts (*Westzinthus, In re., 5 Barnw. & Adolph. R.*, 817).

A still later case in England confirms this last case and recognizes the same doctrine, and shows that goods under such circumstances cannot be retained as security for a general balance of account, but only for the specific advance made upon the security of the bill of lading. The consignor's remedy against a factor thus claiming a general balance, is not, it seems, by the last case, at law, but in equity (*Spalding v. Reeding, 6 Beav. R.*, 376).

But though a consignor of goods may stop them *in transitu* before they get into his consignee's hands, in case of the insolvency of the consignee, yet if the consignee assign the bills of lading (whether by sale or pawn) to a third person for a valuable consideration, the right of the consignor, as against such assignee, is divested entirely or *pro tanto*, whether the indorsement be in blank or to a particular person, for the consignee of a bill of lading has such a property that he may assign it over (*Lickbarrow v. Mason, 2 T. R.*, 63; *Evans v. Martlett, 1 Ld. Raym. R.*, 271).

An assignee acting *mala fide* will stand in the same position, as

to stoppage *in transitu*, as his assignor had previously stood (*Cumming v. Brown*, 9 *East's R.*, 514, *per Lord Ellenborough, C. J.*). And a condition contained in or indorsed on the bill of lading, as that the goods are to be delivered, provided E. F. pay a certain debt, will bind every indorsee who takes it, and he will have no title to the goods unless the condition be performed (*Barrow v. Coles*, 3 *Camp. R.*, 92).

It has been stated in a previous chapter that the pledgee has the right to repledge the goods he holds, and that the second pledgee would, upon such repledging, take the interest of the pledgor and hold the same, together with the possession of the pledge, until it was redeemed by the first pledgor. This doctrine, though broadly asserted by Story and others, had not been fully recognized in England, and perhaps not uniformly so in the American States, until the decision of an important case in the English Court of Queen's Bench in 1866, by which the right to repledge was fully established. An early English case had been often cited as an authority for this proposition, but that appears rather to justify the liberty to repledge, on the inference drawn by and stated in the reporter's marginal note, than to lay it down as a proposition already established by authority.

The facts of the case decided in the Court of Queen's Bench, according to the construction put by the court upon the pleadings, were, that the plaintiff had deposited certain debentures with one Simpson, as security for the payment of a bill of exchange drawn and indorsed by the plaintiff, and discounted by Simpson as pawnee, upon an agreement that he should have "full power to sell, or otherwise dispose of" the debentures if the bill was not paid at maturity. These debentures Simpson pledged with the defendant Suckling; and, as against the latter, it was assumed by the court that the pledge took place before the bill it was originally given to secure fell due, and was made also to secure a greater sum than that represented by the said bill. Under these circumstances the plaintiff sued the defendant, the sub-pledgee, in detainue. The defendant pleaded these facts, and to the plea the plaintiff demurred, bringing the question before the court whether this sub-pledge was or was not a lawful exercise of the pawnee's dominion over the pledge. The point seems to have been treated to a great extent as a new one, and was twice elaborately argued by very able counsel on both sides. The court took time to con

sider; and ultimately, by a majority, the case was decided in favor of the defendant, thus establishing the right of the pawnee to repledge.

Mellor, J., in his opinion, said: "There is a well recognized distinction between a *lien* and a *pledge*, as regards the powers of a person entitled to a lien and the powers of the person who holds goods upon an assignment of deposit by way of pawn or pledge for the due payment of money. In the case of simple lien there can be no power of sale or disposition of the goods which is inconsistent with the retention of the possession by the person entitled to the lien; whereas, in the case of a pledge or pawn of goods, to secure the payment of money at a certain day, on default by the pawnor the pawnee may sell the goods deposited and realize the amount, and become a trustee, for the overplus, for the pawnor; or, even if no day of payment be named, he may, upon waiting a reasonable time, and taking the proper steps, realize his debt in like manner. * * * It appears, therefore, that there is a real distinction between a deposit by way of pledge for securing the payment of money, and a right to hold by way of lien to secure the same object. * * * It appears to me that considerable confusion has been introduced into this subject by the somewhat indiscriminate use of the words 'special property,' as alike applicable to the right of personal retention in case of a lien, and the actual interest in the goods created by the contract of pledge to secure the payment of money. In *Legg v. Evans* (6 M. & W., 42), the nature of a lien is defined to be a 'personal right which cannot be parted with;' but the contract of pledge carries no implication that the security shall be made effectual to discharge the obligation.' In such case, the *general property remains in the pawnor*; but the question is, as to the nature and extent of the interest, or special property, passing to the bailee in the two cases. * * * In a contract of pledge for securing the payment of money, we have seen that the pawnee may sell and transfer the thing pledged on condition broken; but what implied condition is there that the pledgee shall not in the meantime part with the possession thereof to the extent of his interest? It may be that, upon a deposit by way of pledge, the express contract between the parties may operate so as to make a parting with the possession, even to the extent of his interest, before condition broken, so essential a violation of it as to revest the right

of possession in the pawnor; but in the absence of such terms, why are they to be implied? There may possibly be cases in which the very nature of the thing deposited might induce a jury to believe and find that it was deposited on the understanding that the possession should not be parted with; but in the case before us we have only to deal with the agreement, which is stated in the plea. The object of the deposit is to secure the repayment of a loan, and the effect is to create an interest and a right of property in the pawnee, to the extent of the loan, in the goods deposited; but what is the authority for saying that until condition broken the pawnee has only a personal right to retain the goods in his own possession? * * * I think that when the true distinction between the case of a deposit, by way of pledge, of goods, for securing the payment of money, and all cases of *lien*, correctly so described, is considered, it will be seen that in the former there is no implication, in general, of a contract by the pledgee to retain the personal possession of the goods deposited; and I think that, although he cannot confer upon any third person a better title or a greater interest than he possesses, yet, if nevertheless he does pledge the goods to a third person for a greater interest than he possesses, such an act does not *annihilate the contract of pledge* between himself and the pawnor; but that the transaction is simply inoperative as against the original pawnor, *who, upon tender of the sum secured immediately becomes entitled to the possession of the goods*, and can recover in an action for any special damages which he may have sustained by reason of the act in repledging the goods."

Blackburn, J., in his opinion, said: "I think that, both in principle and authority, a contract such as that stated in the plea, pledging goods as a security, and giving the pledgee power, in case of default to dispose of the pledge (when accompanied by an actual delivery of the thing), does give the pledgee something beyond a mere lien; it creates in him a special property or interest in the thing. By the civil law such a contract did so, though there was no actual delivery of possession; but the right of hypotheca is not recognized by the common law. Till possession is given, the intended pledgee has only a right of action on the contract, and no interest in the thing itself (*Howes v. Ball*, 7 B. & C., 481; *E. C. L.*, vol. 14). I mention this because in the argument several authorities, which only go to show that a delivery of possession is,

according to the English law, necessary for the creation of the special property of the pawnee, were cited as if they determined that possession was necessary for the continuance of that property. * * * In England there are strong authorities that the contract of pledge, when perfected by delivery of possession, creates an interest in the pledge, which interest may be assigned. * * * Now, I think that the sub-pledging of goods held in security for money, before the money is due, is not in general so inconsistent with the contract as to amount to a renunciation of that contract. There may be cases in which the pledgor has a special personal confidence in the pawnee, and therefore stipulates that the pledge shall be kept by him alone, but no such terms are stated here; and I do not think that any such term is implied by law. In general, all that the pledgor requires is the personal contract of the pledgee, that on bringing the money the pawn shall be given up to him, and that in the meantime the pledgee shall be responsible for due care being taken for its safe custody. This may very well be done, though there has been a sub-pledge."

Mellor, J., read the judgment of Cockburn, C. J., who said: "I think it unnecessary to the decision in the present case to determine whether a party, with whom an article has been pledged as a security for the payment of money, has a right to transfer his interest in the thing pledged (subject to the right of redemption in the pawnor) to a third party. I should certainly hesitate to lay down the affirmative of that proposition. Such a right in the pawnee seems quite inconsistent with the undoubted right of the pledgor to have the thing pledged returned to him immediately on the tender of the amount for which the pledge was given. In some instances it may well be inferred from the nature of the thing pledged, as in the case of a valuable work of art, that the pawnor, though perfectly willing that the article should be intrusted to the custody of the pawnee, would not have parted with it on the terms that it should be passed on to others and committed to the custody of strangers.

"It is not, however, necessary to decide this question in the present case. The question here is, whether the transfer of the pledge is not only a breach of the contract on the part of the pawnee, but operates to put an end to the contract altogether, so as to entitle the pawnor to have back the thing pledged, without payment of the debt. I am of opinion that the transfer of the pledge does not put an end to the contract, but amounts only to a

breach of contract, upon which the owner may bring an action,—for nominal damages, if he has sustained no substantial damage; for substantial damages, if the thing pledged is damaged in the hands of the third party, or the owner is prejudiced by delay in having the thing delivered to him on tendering the amount for which it was pledged. We are not dealing with a case of lien, which is merely the right to retain possession of the chattel, and which right is immediately lost on the possession being parted with, unless to a person who may be considered as the agent of the party having the lien, for the purpose of its custody. In the contract of pledge, the pawnor invests the pawnee with much more than the mere right of possession. He invests him with a right to deal with the thing pledged as his own, if the debt be not paid and the thing redeemed at the appointed time.

“It seems to me that the contract continues in force, and with it the special property created by it, until the thing pledged is redeemed or sold at the time specified. The pawnor cannot treat the contract as at an end until he has done that which alone enables him to divest the pawnee of the inchoate right of property in the thing pledged which the contract has conferred on him.”

Mr. Justice Shee differed from his learned brethren, assuming, on the facts set out in the pleadings, that Simpson, the original pawnee, had put it out of his power to apply the debentures, by sale or otherwise, in discharge of the plaintiff's liability on his bill of exchange, in accordance with his contract. His lordship regarded the position, that the pawnee had a power over the pawn so extensive as that claimed on his behalf, as a proposition for which there would be no authority whatever but for a case decided by the English Court of Common Pleas, to which he referred, but which he argued was not really an authority for the proposition. The definitions of a pawn, given by Sir William Jones and other authorities, including Judge Story, were deemed by the learned justice to exclude the idea that the pawnee could place the pawn out of the pawnor's power, and out of his own power, to redeem it by payment of the amount given to him as security. “Pawnees, like factors, have an absolute right of possession, as against all the world but their principals, and against them to the extent of their security. This gives them a right, under certain circumstances, to sell, but none at all to pledge; for that is to put the goods out of their own power, and, except by the factor's acts, to leave pawnees

from them defenceless against the suit of the real owners." In great measure the judgment of the eminent dissentient member of the court rested upon the basis that though the pawnee has "a real right" or *jus in re*, a right of possession *until default made*, he has no right of sale *until after default made*; and much of his reasoning appears to indicate a disposition to apply to the pawnee the rules by which persons in a strictly, and, as one might almost say, exclusively, fiduciary capacity are bound, at least in a degree equal to that which bound parties dealing with factors before the passage of the English factor's act. His lordship was, therefore, clearly of opinion that the bailment to the first pledgee was determined by the pledge by him to the second pledgee, and that both pledgees had been guilty of a conversion of the debentures under the circumstances stated in the plea.

But the other three members of the court were of a different opinion, although it is not at all certain that they were unanimous in respect to all of the opinions which they severally expressed (*Donald v. Suckling*, 1 *Law R.*, *Court of Q. B.*, 585).

It will be observed that the Lord Chief Justice Cockburn, while agreeing with the majority of his *puisnes*, hesitated to say that a pawnee has a right to transfer his interest in the pawn, because such a right seemed to him quite inconsistent with the right of the pawnor to have the pawn returned to him immediately on tender of the amount due upon it. But he held that the sub-pledge would not put an end to the contract, but would only give the pledgor an action in which he could recover such damages as he had actually sustained. On the abstract *right* to repledge, therefore, it may be said that, by the judgment in this case no universal binding rule has been laid down, because, while Blackburn and Mellor, JJ., think that such a right does exist, the lord chief justice expressly guards himself from a formal recognition of that doctrine, and Mr. Justice Shee formally and emphatically repudiates it. But the great practical value of the decision lies in the degree to which it discourages the old doctrine that any such act as repawning vitiates the entire contract, and renders the pawnee liable to an action of trover, in which the measure of damages would be the full value of the goods pawned.

An important case, involving similar questions to those discussed in the case of *Donald v. Suckling*, had been previously decided by the English Court of Common Pleas, and was referred

to by the counsel and all the judges in the latter case, in the Queen's Bench. In the case in the Common Pleas, one Cumming, a bankrupt, had deposited with the defendant 243 cases of brandy, to be held by him as a security for the payment of an acceptance of the bankrupt for £62,103, discounted by the defendant, and which would become due January 29th, 1863, and, in case such acceptance was not paid at maturity, the defendant was to be at liberty to sell the brandy and apply the proceeds in payment of the acceptance. On the 28th January, before the acceptance became due, the defendant contracted to sell the brandy to a third person, and on the 29th delivered to him the dock warrant, and on the 30th such third person obtained actual possession of the brandy. In an action of trover, brought by the assignee of the bankrupt, the Court of Common Pleas held that the plaintiff was entitled to recover, on the ground that the defendant wrongfully assumed to be owner in selling; and although that alone might not be a conversion, yet, by delivering over the dock warrant to the vendee, in pursuance of such sale, he "interfered with the right which the bankrupt had on the 29th if he repaid the loan;" but the majority of the court (Erle, C. J., Byles and Keating, JJ) held that the plaintiff was only entitled to nominal damages, on the express ground "that the deposit of the goods in question with the defendant to secure repayment of a loan to him on a given day, with a power to sell in case of default on that day, created *an interest and a right of property in the goods which was more than a mere lien*;" and the wrongful act of the pawnee did not annihilate the contract between the parties, nor the interest of the pawnor in the goods under that contract." From that view of the law, as applied to the circumstances of that case, Mr. Justice Williams dissented, on the ground "that the bailment was terminated by the sale before the stipulated time, and consequently that the title of the plaintiff to the goods became as free as if the bailment had never taken place." The dissent of that most learned judge diminishes the authority of the case on the point, and yet the substantial ground upon which the majority of the court proceeded, that is to say, that the "act of the pawnee did not annihilate the contract between the parties, nor the interest of the pawnor in the goods," is quite consistent with the nature and incidents of a deposit by way of pledge (*Johnson v. Stear*, 15 C. B. R., N. S., 330; S. C., 109 Eng C. L. R., 330).

On the abstract right of the pledgee to sub-pledge the goods in pawn, therefore, the English courts are not yet fully decided; but these two late cases show that the leaning of the courts is toward that power of free though qualified alienation which is regarded as necessary and convenient in carrying on the affairs of a great commercial nation.

Says an English elementary writer: "The pawnee has such an interest in the pawn that he may assign it over to a third person, and the assignee will be subject to an action of detinue if he detains it after payment or tender of the money by the owner" (*Whitaker on Lien*, 140). And another says: "A pawnee may assign the pawn to the extent of his interest" (*Montagu on Lien*, 22).

And it has been before stated that the authority of Judge Story is to the effect that the pledgee may sell or assign all his interest in the pledge; or he may convey the same conditionally by way of pawn to another person; and he adopts the precise language of the learned judge who delivered the opinion in a case before the Supreme Judicial Court of Massachusetts, which he cites as his authority for the doctrine (*Story on Bailm.*, § 324, citing *Jarvis v. Rogers*, 15 *Mass. R.*, 408). And, in respect to this authority, it should be stated that it was a case of the pledge of negotiable securities; and when the case was first before the court, Parker, C. J., said: "This case is distinguishable from the common cases of agents, factors and commission merchants, to whom property has been intrusted for special purposes, and who have no right to exceed that authority. We do not question any of these cases, nor those which have decided that he to whom property has been pledged cannot transfer a title in such property to another. We proceed upon the ground that the plaintiff's intestate had, by his own act, together with the other members of the company, given a negotiable quality to those certificates" (*Jarvis v. Rogers*, 13 *Mass. R.*, 107).

The Supreme Court of the State of Arkansas has recently decided that State bonds, deposited as security for money advanced, are held as a pledge for the payment of the money; and that the transfer of such bonds by the pledgee to a third party passes the debt which the bonds were given to secure. And further, that a purchaser of the pledgee's claim, after the transfer of the bonds, is not entitled to recover the bonds or collect the debt. This case

impliedly, if not expressly, decides that the pledgee may transfer his interest in the pledge without invalidating the security; that is, where the pledge consists of negotiable securities, if not in other cases (*Whitney v. Peaz*, 24 Ark. R., 22).

A similar doctrine was also laid down by the New York Court of Appeals in a recent case, wherein it was expressly decided that a creditor may assign the principal debt to a third person, and give him the benefit of any pledge which he holds to secure the payment of such debt; and that, so long as nothing is done to deprive the pledgor of the right to redeem on payment of the amount due on the principal debt, the pledgor is not injured. So held where the pledge consisted of negotiable promissory notes; and no intimation was given as to what would be the particular rule, where the pledge was that of goods and chattels (*Chapman v. Brooks*, 31 N. Y. R., 75).

A very reasonable doctrine upon this point would seem to be, that the pledgee may transfer his *interest* in the pledge to a third person, either by absolute sale or sub-pledge, without invalidating the security; at the same time being responsible to the pledgor for any injury to the property pledged or other damage which may arise by reason of the sale or sub-pledge. And the Supreme Court of Pennsylvania recognized the principle in a late case, wherein it was held that the pledgee of collateral securities may exchange them without the consent of the pledgor, unless restricted by the express terms of the pledge; but that, if loss result from the want of proper care and diligence, he is responsible to the pledgor for the extent of the injury (*Gerard, etc., Ins. Co. v. Marr*, 46 Penn. R., 504).

Another right seems to pertain to the pledgee, while he holds the pledge, and before the debt becomes due for which the property is put in pledge; which is, that any interest or addition in the ordinary course of things accruing in respect to the things pledged may be held by the pledgee with the original pledge as security for the payment of the debt or performance of the act which the pledge was first made to secure. To this effect is a recent decision of the Supreme Court of the State of Maine, by which it was held that if one pledges as collateral a demand, on which interest is accruing at stated periods, some of which accrue before his debt, so secured, becomes due, such pledge necessarily implies an authority to the pledgee to collect and receive the interest as it becomes payable, and hold it, on the same terms as the

demand itself, especially if the collateral be a bond with interest coupons attached, which the pledgor does not cut off before the bond is pledged. And it was expressly decided that when a railroad company pledges its own bonds as collateral for the payment of debts contracted by the company, and the pledgee cuts therefrom and collects of the agents of the company the interest coupons that afterward become due, such acts cannot operate as a conversion of the bonds by the pledgee (*Androsoggin R. R. Co. v. Auburn Bank*, 48 *Maine R.*, 335). And it may be added, in general terms, that the pledgee of goods, with an interest in them as security for a debt or demand, is armed with the whole power and remedies of the law to protect his possession and support his claim. And when the pledge is a promissory note or other negotiable paper, and the same becomes due and payable before the pledgor's default in redeeming, the pledgee may receive the money due on the note or other security and hold it in place of the paper originally pledged.

CHAPTER XLIV.

RIGHTS OF THE PLEDGEE TO ENFORCE HIS CLAIM BY DISPOSING OF THE PROPERTY PLEDGED AFTER THE CLAIM HAS MATURED — NEGOTIABLE SECURITIES TO BE COLLECTED AND THE MONEY APPLIED TO PAY THE DEBT.

WHEN there has been a default in the pledgor in paying his debt or complying with his engagement, it is the right of the pledgee, as a result of the contract of pledge, to dispose of the pledge for the purpose of realizing his claim or indemnity. If the contract does not fix the time for the payment of the debt, or within which the pledgor must perform his engagement, the pawnee has a right, after a reasonable time has elapsed, to call upon the pledgor and demand a fulfillment of the engagement; and if he neglects or refuses to comply, the pledgee is at liberty to proceed, in the manner prescribed by law, to enforce his claim. The process to be taken by the pledgee may depend somewhat upon the terms of the contract of pledge or the nature of the pledge itself.

Where the pledge is a negotiable security, as a promissory note, a bill of exchange, and the like, the authorities are uniform in holding

that the pledgee has the right to collect the money due thereon by a suit, if necessary, and apply the proceeds to the satisfaction of his claim; and if there should happen to be a surplus, such surplus would belong to the pledgor. The pawnee's authority, in these cases, extends only to receiving the amount of the note or other negotiable security. He has no right, ordinarily, to compromise the same for less than the face, although, if the circumstances required it, doubtless the security might be disposed of by a judicial proceeding, after the pledgor has had notice to redeem it; and in all cases where notice to redeem cannot be given to the pawnor personally, the disposition of the pledge must be authorized by judicial proceeding, unless the contract of pledge prescribes the manner of proceeding. A pledging of promissory notes, and the like, implies authority to the pledgee to collect the same when due (*Nelson v. Wellington*, 5 Bosw. R., 178).

The rule in respect to the disposition of commercial securities, which have been pledged, seems to be well settled by a well considered case in the New York Court of Appeals, wherein it was decided that the pledge of commercial paper as security for a loan of money does not, in the absence of a special power for that purpose, authorize the pledgee, upon the non-payment of the debt, and upon notice to the pledgor, to sell the securities pledged either at public or private sale; but that he is bound to hold and collect the same as they become due, and apply the money to the payment of the loan.

Brown, J., who delivered the opinion of the court, among other things, upon this point, said: "The contract was a pledge and not a mortgage. It was entirely silent as to the power of the pledgee over the subject of the pledge. It imposed no conditions and prescribed no terms in regard to the disposition of the notes, in the event of the loan not being paid at maturity. His power and authority to deal with them is to be determined by the law. The notes were deposited in his hands as collateral security, and we are to say what the term imported, what rights it conferred, and what duties it imposed upon the pledgee. The primary, and indeed the only purpose of the pledge is to put it in the power of the pledgee to reimburse himself for the money advanced when it becomes due and remains unpaid. The contract carries with it an implication that the security shall be made effectual to discharge the obligation. 'It simply clothed the creditor with authority

to sell the pledge and reimburse himself for his debt, interest and expenses, and the residue of the proceeds of the sale then belonged to the debtor. It has been supposed by some writers that to justify such a sale it was indispensable that it should be made under a decretal order of some court, upon the application of the creditor. But, although the creditor was at liberty to make such application, it does not appear that he might not act, in ordinary cases, without any such judicial sanction, after giving proper notice of the intended sale, as prescribed by law, to the debtor' (*Story's Eq. Jur.*, 1008; 2 *Kent's Com.*, 582). * * * Where the subject of the pledge consists of goods and merchandise, or chattels of any kind, there is no other way in which they can be applied to the payment of the debt, unless they are first converted into money, which can only be done by a sale. * * * But where choses in action for the payment of money, notes, bills, bonds and mortgages are the subject of the pledge, the case is widely different. This species of property has no intrinsic value, of which one person may judge as well as another. They are the written evidences of debts due, or to become due from others, and their value depends exclusively upon the solvency and ability of the debtor to pay them at maturity. They are not merchandise in the usual sense of the word; and, although they are sometimes the subject of sale, the practice is of recent origin, and evidence of the abuses rather than the legitimate uses of credit. A creditor holding such property in trust for the use of his debtor, and offering it for sale in satisfaction of his debt, can hardly fail to sacrifice it; for, unless the solvency and circumstances of the makers of the note are well known and placed beyond doubt, few will purchase, and those only for the purpose of speculation and at ruinously low prices. Unless the stipulations of the contract are expressly to that effect, the law will not require the debtor to submit his property to an ordeal which must be, in a great measure, destructive of its value. It will rather presume that it was the intention of the parties to the contract that the creditor should, if he resorted to the pledge in place of the personal liability of the debtor, accept the money upon the hypothecated securities, as it became due and payable, and apply it to the satisfaction of his debt. This is the fair import of the contract, for it is not reasonable to infer an intention to subject to the hazards of a sale a species of property which is not usually the subject of a sale, more especially when that property

furnishes itself a means of reimbursing the creditor without loss, or the hazard of loss to the debtor. The acceptance of the pledge does not suspend the creditor's remedy against the debtor a moment after the debt falls due. But if he resorts to the hypothecated securities, consisting of the written obligations of others for the payment of money, he must accept the money upon them as they become due, in place of selling, and, perhaps, sacrificing them at a sale. This is just and right, both to debtor and creditor, and the law seeks to accomplish nothing less. In respect to the subject of the pledge, the right of property does not pass to the pledgee, but remains with the pledgor, subject to the lien of the former (2 *Kent's Com.*, 581). His character is that of trustee for the pledgor, first to pay the debt, and second to pay over the surplus, and he cannot so deal with the trust property, so as to destroy or even impair its value" (*Wheeler v. Newbould*, 16 *N. Y. R.*, 392, 396-398).

This opinion of the learned judge presents the doctrine in such cases, and the reasons for the rule, in language both clear and cogent; and it would be difficult to add to or take from the extracts here given, or express the doctrine in better terms, which is a sufficient reason for occupying so much space with a single authority.

The present Supreme Court of the State of New York recently held that it is the right of the holder of choses in action, as collateral security, to enforce payment of them and thus satisfy the principal debt, unless prohibited from so doing by the contract under which he obtained the collaterals. Of course the whole matter may be regulated by the express terms of the pledge (*Nelson v. Edwards*, 40 *Barb. R.*, 279).

The Supreme Court of Wisconsin has recently decided that notes assigned as collateral security may be sued on at the same time as the original debt, and judgments taken in all the suits, and collected to the amount, at least, of the original debt and the costs in all the suits; but if more is collected, the creditor holds the surplus for the benefit of the assignor (*Plant's, etc., Co. v. Falvey*, 20 *Wis. R.*, 200; and *vide Hilton v. Waring*, 7 *ib.*, 492).

The Supreme Court of Louisiana has lately held that a pledge of a promissory note may be made, and may enable the pledgee to sue in his own name and recover on the note without the indorsement of the pledgor; thus recognizing the general doctrine on

the subject (*Louisiana State Bank v. Gaiennie*, 21 *La. Ann. R.*, 555). And a similar decision was made, about the same time, by the Supreme Court of the State of Minnesota (*White v. Phelps*, 14 *Minn. R.*, 27).

The Supreme Court of Louisiana, at a somewhat earlier day, decided that the pledgee of a note has the right to demand and receive the money due on it, and to sue for it in his own name (*Dux v. Tully*, 14 *La. Ann. R.*, 456). And the Supreme Court of Indiana has further held that such pledgee must account for its whole value, that is, the whole face of it, principal and interest, and that he cannot, to the prejudice of the pledgor, settle with the maker for less, or take a note in part satisfaction. If the pledgee does thus settle, of course the pledgor may hold him responsible for the entire demand, and, it seems, may sue him for the value without a previous demand (*Depuy v. Clark*, 12 *Ind. R.*, 427; and *vide Jones v. Hawkins*, 17 *ib.*, 550).

An exception to the general rule on the subject was lately made by the Supreme Court of California. The court held that where negotiable paper was indorsed over to and held by the creditor as security for the payment of a debt, without any other express agreement between the parties, and where the maker of the note resided in another State, and it was not shown that he had any property subject to seizure and sale within the jurisdiction; under such circumstances the holder of the instrument given in pledge was authorized to resort to a court of equity for a foreclosure and sale (*Donohoe v. Gamble*, 38 *Cal. R.*, 340). This would seem to be quite reasonable; for it is obvious, in a case of this kind, that the collection of the note would be attended with not a little expense, which it is probable the pledgee would have no right to deduct from the amount collected. Under such circumstances, it would be more equitable that the security be sold for what it would bring at a fair sale, and let the purchaser make the most of it.

The Supreme Judicial Court of Massachusetts has recently decided that the recovery of judgment, without satisfaction thereof, upon a simple contract debt, will not discharge a pledge given as collateral security for the debt. And further, that if a promissory note, which is without consideration as between the original parties thereto, is delivered without consideration to another person who pledges it, before its maturity, as collateral

security for a debt of his own of less amount than the face of the note, the pledgees, if they take it without notice, are to be deemed holders for value, and may maintain an action thereon for the amount due to them upon the debt which it was pledged to secure.

In the opinion of the court it was said: "The doctrine of merger of a simple contract in the higher security of a judgment on such contract is wholly inapplicable to this case. The note in suit was pledged as collateral security for a debt due to the plaintiff from the pledgor, and this pledge continued valid and effectual until such debt was paid or discharged, notwithstanding the evidence of it had been changed from a promissory note to a judgment of a court of record thereon.

The evidence established that the plaintiffs received the note from the holder before its maturity, without any knowledge of the circumstances under which the defendants had delivered it to the payee, or the purpose for which the latter delivered it to the holder, and that it was held by the plaintiffs as collateral security for a valid debt due from the holder to them. Under the decision of the court, these facts proved that the plaintiffs were *bona fide* holders for value and without notice, and were therefore entitled to recover to the extent of their debt for which the note was pledged as collateral security" (*Fisher v. Fisher*, 98 *Mass. R.*, 303, 304).

CHAPTER XLV.

RIGHTS OF THE PLEDGEE AFTER THE CLAIM HAS MATURED — IN CASE GOODS OR PERSONAL PROPERTY ARE PLEDGED; THE PLEDGE MUST BE SOLD — WHEN AND HOW THE PLEDGE IS TO BE SOLD — RIGHTS OF PLEDGEE IN CASE OF PLEDGE TO SECURE ILLEGAL CLAIM — EXTENT OF THE PLEDGEE'S CLAIM IN THE PLEDGE — PLEDGEE'S RIGHTS WHEN SEVERAL THINGS ARE PLEDGED — WAIVER OF ERRORS IN THE SALE OF THE PLEDGE.

WHERE the pledge consists of anything but negotiable paper, and the pawnor becomes in default by not paying the debt or performing his engagement, the pawnee acquires a right to dispose of the pledge for the purpose of raising the money to pay himself, or indemnifying himself, for the matter which the pledge was made to secure. In an early case in the State of Mississippi, it was

intimated that the pawnor, where property is pledged to indemnify against a debt, may, on the debt's falling due, apply the property in discharge of the debt (*Vest v. Craig*, 3 *Miss. R.*, 219). But this is not the correct doctrine. On the debt's falling due, the pledgee has simply the right to sell the pledge and pay himself out of the proceeds, and, until a sale, the authorities are uniform in holding that the pawnor may redeem the pledge by paying the debt. If the contract of pledge specifies the time within which the pledge must be redeemed, or, in other words, there is an agreement as to the time when the pledge may be sold, upon the expiration of the stipulated time the pledgee may proceed to make sale of the thing pledged. If there is no stipulated time for the payment of the debt, but the pledge is for an indefinite period of time, the pawnee has a right, upon request, to insist upon a prompt fulfillment of the engagement; and if the pledgor neglects or refuses to comply, the pledgee may, upon due demand and notice to the pledgor, require the pledge to be sold (*Story on Bailm.*, § 308). Sometimes it is held that the pledge may be sold without previous notice to the pledgor, and in other cases it is held that notice of the sale must be given. Sometimes the matter of the disposition of the pledge, in case of default of the pledgor, is regulated by statute, although there are but a few of the States which have special statutes upon the subject. It may be affirmed, however, that in all cases it is safe not to sell without previous notice, and that care should be taken not to sell the pledge before the pledgee has acquired the right to do so.

The Supreme Court of Illinois, at an early day, decided that where goods are pledged to secure a debt or interest, with a provision for a forfeiture in case of non-payment at a day fixed, the time may be extended by a subsequent parol agreement, and that no new consideration for such extension is necessary. And when, in such case, an extension of the time has been given, the court held that the creditor cannot sell the goods before the expiration of such extension; and in case he does so sell, it is a conversion; and the creditor is liable for the full value of the goods, without any deduction for the amount of his debt (*Wadsworth v. Thompson*, 3 *Gilman's R.*, 423).

The rule in respect to the sale of the pledge, as extracted from the authorities and books, by Judge Story, is to the effect that by the Roman law a right of sale was given, the

same as in the common law. If a right to sell constituted a part of the contract, it was obligatory. If no such right was provided for in the contract, and a sale was not prohibited, it might be made. And even if prohibited, the pledgee might, after regular notice and proceedings against the pledgor, have a right to sell upon his default of payment. The sale might be by a judicial order of sale or by the act of the party, after due notice to the owner. And in either case, if the sale was *bona fide*, it passed the title completely to the purchaser. Justinian, however, directed that if any mode of selling was prescribed by the parties, that should be followed, and that in the absence of any such stipulation the pawnee might sell, after two years from the proper notice to the party, or from a judicial sentence, and not before. The modern nations of continental Europe, and others using the civil law, seem generally to have adopted the rule of requiring a judicial sale (*Story on Bailm.*, § 309, *citing Pothier, Domat, Ayliffe, Kent's Com., Bell's Com., and other writers for authority*).

The common law of England, existing in the time of Glanville, says Story, seems to have required a judicial process to justify the sale, or, at least, to destroy the right of redemption. But the law, as at present established, leaves an election to the pawnee. He may file a bill in equity against the pawnor for a foreclosure and sale, or he may proceed to sell *ex mero motu*, upon giving due notice of his intention to the pledgor. In the latter case, if the sale is *bona fide* and reasonably made, it will be equally as obligatory as in the first case. But the opinion is clearly expressed that a judicial sale is most advisable in cases of pledges of large value, as the courts watch any other sale with uncommon jealousy and vigilance; and any irregularity may bring its validity into question (*Story on Bailm.*, § 310, *and authorities cited*).

With some few exceptions, the rule upon the subject which prevails in England has been adopted by the American States, and a brief reference to the leading American authorities will present the tone of the courts upon the point.

A leading case in the State of New York was decided by the old Supreme Court of the State, and lays down the rule that a creditor having personal property pledged to him by his debtor, as security for the debt, cannot sell the same until he has first called upon the debtor to redeem the pledge, and that he must also give him notice of the time and place of sale; and that the

rule, in this respect, is the same, whether the pledge was made to secure a debt, payable presently, or one payable at a future day.

Jewett, J., gave the opinion of the court, and said: "Non-payment of the debt at the stipulated time did not work a forfeiture of the pledge, either by the civil or at the common law. It simply clothed the pledgee with authority to sell the pledge and reimburse himself for his debt, interest and expenses, and the residue of the proceeds of the sale belonged to the pledgor. The old rule existing in the time of Glanville, required a judicial sentence to warrant a sale, unless there was a special agreement to the contrary. But as the law now is, the pledgee may file a bill in chancery for a foreclosure and proceed to a judicial sale, or he may sell without judicial process, upon giving reasonable notice to the pledgor to redeem, and of the intended sale. I find no authority countenancing the distinction contended for; but, on the contrary, I understand the doctrine to be well settled, that, whether the debt be due presently or upon time, the rights of the parties to the pledge are such as have been stated. * * * Nor do I see any reason for such a distinction. In either case the right to redeem equally exists until a sale; the pledgor is equally interested to see to it that the pledge is sold for a fair price. The time when the sale may take place is as uncertain in the one case as in the other. Both depend upon the will of the pledgee after the lapse of the term of credit in the one case, and after a *reasonable* time in the other, unless, indeed, the pledgee resorts to a court of equity to quicken a sale. Personal notice to the pledgor to redeem, and of the intended sale, must be given as well in the one case as in the other, in order to authorize a sale by the act of the party. And if the pledgor cannot be found, and notice cannot be given him, judicial proceedings to authorize a sale must be resorted to (2 *Story's Com. on Eq.*, § 1008). Before giving such notice the pledgee has no right to sell the pledge; and if he does, the pledgor may recover the value of it from him, without tendering the debt, because, by the wrongful sale, the pledgee has incapacitated himself to perform his part of the contract, that is, to return the pledge, and it would, therefore, be nugatory to make the tender" (*Stearns v. Marsh*, 4 *Denio's R.*, 227, 230, 231).

From a very early day the right of the pledgee to sell the pledge after the debt is due, upon reasonable notice, has been conceded in the State of New York, and a custom has grown up and has

been sanctioned by the courts, of selling stocks held in pledge in the city of New York, at the Merchants' Exchange in said city; that is to say, this is the general understanding of the law, unless a sale is restricted by positive stipulation. Any other disposition of the pledge must rest upon express agreement.

The Court of Appeals of the State of New York, in a case hereinbefore referred to upon another point, decided that a creditor having personal property pledged to him by his debtor as security for the debt, cannot sell the same until he has demanded payment of the debtor. And that the rule is the same, although the debt is payable presently and without demand, and although by the terms of the pledge the creditor may sell at public or private sale, without giving notice to the debtor. The notice of the sale of the pledge was expressly waived by the terms of the pledge, but the court held that this did not supersede the necessity of demand of payment of the debt.

Ruggles, J., delivered the opinion of the court, and said: "In every contract of pledge there is a right of redemption on the part of the debtor. But in this case that right was illusory and of no value, if the creditor could instantly, without demand of payment and without notice, sell the thing pledged. We are not required to give the transaction so unreasonable a construction. The borrower agreed that the lender might sell without notice, but not that he might sell without demand of payment, which is a different thing. The lender might have brought his action immediately, for the bringing an action is one way of demanding payment; but selling without notice is not a demand of payment, and it is well settled that where no time is expressly fixed by contract between the parties for the payment of a debt secured by a pledge the pawnee cannot sell without a previous demand of payment, although the debt is, technically, due immediately" (*Wilson v. Little*, 2 N. Y. R., 443, 448).

The Superior Court of the city of New York, some time ago, decided that bonds or stocks of a corporation, pledged as collateral security for the payment of a note at maturity, without any express authority to sell them, may, upon default of payment of the note, be sold by the pledgee, at public auction, upon reasonable notice of the time and place of sale; and the place in the city of New York may be the Merchants' Exchange. And it was declared that any other mode of sale must rest upon express

agreement. But it was held that commercial paper so pledged cannot be sold; that in such case the pledgee can only keep the paper until it matures, and then collect and apply it (*Brown v. Ward*, 3 *Duer's R.*, 660).

Judge Edmonds sitting as circuit judge once held that the notice to be given by the pledgee is not of the time and place of the sale, but of an intention to sell in enforcement of the lien, unless the debt is paid (*Harkins v. Peterson*, 1 *Edm. Sel. Cas.*, 120). But this is not in accordance with the general rule as it is well settled by leading authorities.

The Court of Appeals of the State of New York, in a quite recent case, laid down what they regarded the true rule upon the subject under consideration, holding, in substance, that the general rule, in the absence of a contract, affecting the question is, that the pledgor must have notice of the time and place of the sale of the pledge; declaring that the principal reason assigned for the rule is, that the pledgor may have an opportunity to attend the sale and see that it is fairly conducted; that he may exert himself in procuring buyers, and thus enhance the price; that he has, in fact, the right to redeem the pledge at any moment before the sale shall be actually made. And it was said that these rules should be carefully adhered to, in all cases in which they are applicable. They may be modified or waived by agreement; and in case a special agreement has been made between the parties, controlling their right, it is subjected, like other agreements, to the well settled rules of construction. The previous authorities were examined, and the rule declared, as above, to be the general rule on the subject (*Milliken v. Dehon*, 27 *N. Y. R.*, 364, 373).

In a case before the old Supreme Court of the same State, the question of the proper disposition of a pledge, after default of the pledgor, was examined, and decided in accordance with the rule before indicated. The facts of the case were: The plaintiff applied to the defendants to borrow \$21,000 for sixty days, offering as collateral security 250 shares of North American Trust and Banking Company stock. The defendants accepted the proposition, advanced the money, and took a note for the amount, stating therein the deposit of the stock, and that the defendants were authorized to sell the same, on non-payment of the loan, at the board of brokers in New York city, and that notice of the sale was waived if not paid at maturity. The defendants sold the

stock before the loan became due, and the borrower brought suit to recover for the value of the stock, and the court gave judgment for the same, less the amount of the note. The defendants moved for a new trial which the court at General Term denied.

Nelson, C. J., delivered the opinion of the court, and said: "It is not pretended that a pledgee, as such, has a right to dispose of the pledge before the pledgor fails to comply with his engagement; on the contrary, it is conceded that such right, if it exists at all, must be conferred by an express or implied agreement. In this case, as the agreement between the parties was in writing, the question as to the defendants' right to sell the stock before the note became due must be determined, as in other cases depending upon the construction of written instruments, by consulting the terms and provisions of the agreement, and thus endeavoring to ascertain the understanding and intent of the parties. * * * The note contains no consent, express or implied, that the defendants may sell or dispose of the stock before the loan becomes due. On the contrary, it contains a strong implied prohibition against selling, except in a single event, viz., nonpayment of the money at the day specified. There is not only no authority to sell before the happening of this event, which of itself is enough to refute the pretensions of the defendants, and subject them to the consequence of a breach of trust, but, having provided for the sale at a given period and on a specified condition, all idea of authorizing one previous to that time is necessarily negatived upon the familiar maxim, *expressio unius est exclusio alterius*" (*Allen v. Dykers*, 3 *Hill's R.*, 593, 596, 597). Error was then taken from the Supreme Court to the Court of Errors, where the judgment was almost unanimously affirmed, only one senator dissenting.

The chancellor, in his opinion, said: "Fungibles, or such articles as are capable of being estimated generally by weight, number or measure, do not, when deposited as a pledge, become the property of the pledgee, as they do upon a loan of them; for the pledge is not for use, but merely as a security. If the pledgee, therefore, sells the pledge without authority, it is a violation of his trust, although he afterward purchases other articles of the same kind and value, to be returned to the pledgor, unless there is some agreement, either express or implied, between the parties, that he shall be permitted to do so. * * * In the case under consideration, there was no express agreement that the pledgees should

be permitted to sell the stock before the note became payable. And the express contract contained in the note itself, that they should be at liberty to sell the stock after a certain specified time and in a particular manner, precluded the idea of any implied authority to sell before the note became due, or at any other place than at the board of brokers. * * * The authority to sell the stock in question at the board of brokers, for the payment of the debt, if such debt was not paid when it became due, did not authorize the pledgees, even if they had retained the stock in their own hands, to put the same up secretly. But they should have put up the stock openly, and offered it for sale to the highest bidder, at the board of brokers; stating that it was stock which had been pledged for the security of this debt, and with authority to sell it at the board of brokers, if the debt was not paid. In this way only the stock would be likely to bring its fair market value at the time it was offered for sale; and in this way alone could it be known that it was honestly and fairly sold, and that it was not purchased in for the benefit of the pledgees by some secret understanding between them and the purchasers."

Wright, Senator, in his opinion, said: "Even had there been no written agreement in this case, and the stock had been pledged for repayment of the moneys advanced, the plaintiffs could not have sold or parted with it absolutely until the time of redemption expired, and then only by a judicial sale. The pledgee of property has no authority to sell the pledge until there is a forfeiture (4 *Kent's Com.*, 138), although he may assign it, and the assignee will take subject to all the responsibilities of the pledgee (2 *Kent's Com.*, 539). But here is a written agreement, which, as I read it, expressly prohibits the sale of this stock before the time limited for the payment of the money, and I know of no rule of law which will confer upon a stock broker in Wall street any greater authority over a pledge than is given by law to a pledgee of property elsewhere. * * * But it was insisted upon the argument that the usage of stock-jobbers in Wall street, to hypothecate or repledge stock taken by them upon a loan, formed a part of the contract in question, and an authority for the course pursued by the plaintiffs in error. It is a sufficient answer to this to say, that no such authority is reserved in the written contract; and to allow the usages of Wall street to control the general law in relation to any matter might result in the establishment of principles not always

in accordance with sound morals. I prefer that legal principles should have a universal application, and that contracts should receive the same interpretation in the thronged and busy mart of our commercial metropolis that they do elsewhere" (*Dykers v. Allen*, 7 *Hill's R.*, 497-502).

It was hardly necessary to quote so largely from the opinions in this case to justify the judgment arrived at; for it would certainly seem to be a very plain case, and was very properly decided. But there are general principles enunciated in the discussion, which make the opinions the more valuable upon the point under consideration here. The remark of Senator Wright, that a pledge, after the default of the pledgor, can only be sold by a judicial sale, would not now be recognized; but otherwise the opinions are able and reliable.

Several interesting questions respecting the proper disposition of a pledge were very ably discussed in the decision of a late case by the present Supreme Court of the State of New York, the doctrine of which, as extracted by the reporter, and given in the syllabus, is the following:

Where certificates of stock are deposited with a broker by a customer as *margin*, or additional security against loss to him, while carrying other stock for the depositor, the transaction in law is a *pledge*; and, being such, annexing to the scrip pledged a power of attorney from the owner, authorizing the transfer of the scrip, does not change the character of the transaction, but is merely a necessary act to put the pledge in a condition to be available, as such, in case of the pledgor's default. As between the pledgor and the pledgee, in such a case, the latter has no legal right, secretly or without the knowledge of or notice to the pledgor, to sell the stock pledged. The use of the certificates of stock by the pledgee, beyond the mere purpose of a pledge or margin, is tortious, if not felonious. And a transfer of the certificates by the broker to a third person gives no title to the latter as purchaser, though he pays a valuable consideration therefor, and though the scrip has a blank power of attorney attached, and even though such purchaser believed he was dealing with a person who had authority to sell.

Potter, J., held this to be the rule in regard to every species of personal property pledged, except commercial paper; and he declared that certificates of stock have not yet been recognized by

the courts as another exception to the rule, and as holding equal rank in this respect with bills of exchange and promissory notes.

The court unqualifiedly held that where the transaction was a pledge, in the circumstances of the case at bar, the pledgor has a right of redemption, and before a sale can be made by the pledgee the pledgor is entitled to reasonable notice, and demand of payment of his liability, and there must be default of such payment on his part; and that such a transaction as that disclosed by the case before the court did not amount to an *agency* of the pledgee for the pledgor. Upon this last position of the court, and which is not involved in the present discussion, reference was made to the case of *Crocker v. Crocker* (31 *N. Y. R.*, 50), and the case was commented upon and distinguished, and stated to be unskillfully reported, and well calculated to mislead (*McNeil v. The Fourth National Bank in the city of New York*, 55 *Barb. R.*, 59).

A little subsequent to the decision of this last case, a similar decision was made by the New York Court of Appeals, in a case hereinbefore referred to upon a different point. In this case, it appeared that the defendants, stock-brokers, at the request of the plaintiff, and for him, but in their own names and with their own funds, purchased certain stocks, he depositing with them a "margin" of ten per cent, which was to be "kept good," and they "carrying" the stocks for him. The court held that the legal relation created between the parties by this transaction was necessarily that of pledgor and pledgees, the stock purchased being the property of the plaintiff, and, in effect, pledged to the defendants as security for the repayment of the advances made by them in the purchase; and that a sale of such stock by them, except upon judicial proceedings or after a demand upon him for the repayment of such advances and commissions, and a reasonable, personal notice to him of their intention to make such sale in case of default in payment, specifying the time and place of sale, is a wrongful *conversion* by them of the property of the plaintiff. And it was also held, as it was in other cases hereinbefore referred to, that in an action by the plaintiff against them for such conversion, evidence of a usage that stocks so held might be sold without notice by the broker, whenever, by the fall of the stock in the market, the "margin" or ten per cent deposit was exhausted, was inadmissible, such usage being in direct variance with the settled rule of law applicable to the case. Two of the judges were of the opinion that the transaction was not one

f pledging, but they did not dissent from the majority of the court in respect to the proper disposition of the pledge, upon failure of the pledgor to redeem.

Hunt, C. J., in his opinion upon this point, said: "In my judgment the contract between the parties to this action was in spirit and effect, if not technically and in form, a contract of pledge. To authorize the defendants to sell the stock furnished, they were bound, first, to call upon the plaintiff to make good his margin; and, failing in that, he was entitled, secondly, to notice of the time and place where the stock would be sold; which time and place, thirdly, must be reasonable" (*Markham v. Jaudon*, 41 N. Y. R., 235, 243; and *vide Lawrence v. Maxwell*, 6 Alb. L. J., 388).

The present Supreme Court of the same State had before it in 1863 a case, in some respects, similar to the one in the 41st New York Reports, in which it appeared that the defendants agreed with the plaintiff to purchase stocks for him with their own money, to hold and sell for him as he should direct, and for the advances they were to receive a fixed rate of interest and a commission; and as security against depreciation and loss, the plaintiff was to deposit with them a margin of five per cent upon the par value of all purchases of stocks made by them for him, which margin was to be kept good the whole time.

The court held that, although prices sank so low that the collaterals deposited were no longer equal to the margin of five per cent stipulated in the contract, the defendants had no right to sell to the board of brokers the stocks pledged to them by the plaintiff or their security, without notice to or knowledge of the plaintiff.

The court also decided that the notice which should have been given by the defendants was not a notice to redeem, but a notice to make the security deposited equal to the five per cent stipulated in the contract, or that the defendants would proceed to sell and convert the stock into money, and apply the proceeds to reimburse themselves for the moneys advanced, with the interest and commissions.

And it was also further declared in the case that a sale of stocks to the board of brokers is not to be deemed a public sale, but that it is essentially a private sale; and that a sale of collaterals held by the pledgees thus made, without notice, is a clear violation of the duty and obligation they owe the pledgor.

Brown, J., delivered the opinion of the court, and upon this

point said : " The defendants claim the right to sell the property pledged, without notice to or knowledge of the pledgor, the moment prices sink so that the collaterals deposited are no longer equal to the margin of five per cent stipulated in the contract. The nature of the business is so unstable and precarious that this contingency may happen at any moment, from causes over which neither the pledgor nor any other person has any control. But whenever it does happen the defendants claim a right, without a moment's notice, or an opportunity afforded the owner of the stock to make the security equal to the stipulation in the contract, to sell the property pledged, at the broker's board, at such price as any member present may choose to give, whatever may be the sacrifice and injury to the owner of the stock pledged. Such a construction of the contract is utterly subversive of the objects which the parties had in view when it was made, and destructive of the rights and interests of the plaintiff. It places him in a position of entire helplessness, and takes away his property before he is aware that the margin is insufficient, and before he is in any default for omitting to make and maintain the security equal to the stipulations of the agreement. * * * The sale which the defendants made of the plaintiff's stocks was not public ; it was essentially private. The board of brokers is an association of dealers in stocks, and is not open to the public. None but members are allowed to be present at the meetings, except upon invitation. When the stock was offered and sold, it was not stated whose stock it was, nor was the purpose of the sale mentioned or intimated at the time. * * * This was not dealing fairly and justly with the property, and was, in my judgment, a clear violation of the duty and obligation of the defendants under the contract " (*Brass v. Worth*, 40 *Barb. R.*, 648, 652-654).

This last position, in respect to a sale of pledged stock at the board of brokers, is in accordance with other authorities. In an early case before the present Supreme Court of New York, Edwards, P. J., said : " But the objection as to the place where the stock was sold was well taken. The sale at the board of brokers has often been held not to be such a public sale as is required in such cases " (*Rankin v. McCullough*, 12 *Barb. R.*, 103, 107).

In another comparatively recent case before the same court, Ingraham, P. J., said ; " Excluding the authority contained in that note, the defendants could not have sold the stock without

notice of the time and place of sale; and in such case the sale must be public at the time and place mentioned in the notice. But where the parties agree to have the pledge sold at public or private sale, without notice, the party pledging the property cannot insist that he should have notice" (*Genet v. Howard*, 45 *Barb. R.*, 560, 563).

There have been some decisions of the Supreme Court of the State of New York, apparently hostile to some of the doctrines herein enunciated, but they must be regarded as overruled by adverse decisions in the Court of Appeals. For example, the cases of *Hawks v. Drake* (49 *Barb. R.*, 186) and *Sterling v. Jaudon* (48 *ib.*, 459) were declared by one of the judges of the Court of Appeals, in an opinion lately pronounced, as virtually overruled (*Markham v. Jaudon*, 41 *N. Y. R.*, 243, *per Hunt, C. J.*).

In a very recent case, decided by the Court of Appeals of the State of New York, the question as to the legality of the sale of a pledge was examined and disposed of. The defendants were employed by the plaintiff as brokers to purchase and sell stock on his account, they advancing the money and holding the stocks, and he securing them by the deposit of a margin. On the 18th of April, 1864, when stocks were falling, the stock of the plaintiff held by the defendants not being of a sufficient value to secure the defendants for the moneys already advanced for him, they demanded of the plaintiff a further margin. The demand was made by a written notice, left at his house. He was out of town at that time, and continued so for ten days. On the 19th, without notifying him of the intended sale, or its time or place, certain shares of the plaintiff's stock were sold. On his return the plaintiff disavowed the sale, to which avowal the defendants acceded, and told the plaintiff that they would not consider the sale as having been made on his account. On the 28th of April, they served on the plaintiff a notice that the stocks would be sold at auction, at a specified time and place, at which they were sold, and the amount credited to him. For some days previously they had repeatedly called upon him to make up his margin. The court held that both parties having agreed to consider the sale of the 19th of April as a nullity, the plaintiff was precluded from maintaining an action against the defendants for a conversion, by reason of their making such sale, without previously notifying him of the time and place of the same; that both parties having

agreed and acted upon the assumption that there was no sale, and consequently no conversion of the plaintiff's stock, on the 19th of April, the question of the effect upon the right of action of the restoration of the property to the owner after conversion was not involved (*Stewart v. Drake*, 5 *Albany Law Journal*, 43).

Upon this point, therefore, it may be affirmed as the settled doctrine of pledges, as declared by the courts of New York, that the pledgee never can sell unless there is a waiver, without first calling upon the party, if he is within reach, and requiring him to make his pledge good, and then giving him a reasonable notice of the time and place of sale, and the sale must be a public one and fairly conducted. And, unless there is an agreement to the contrary, the pledgee can never proceed to sell the pledge until default of the pledgor. This is the doctrine of pledges, as declared in New York; and, as the subject is not regulated in the least by statute in this State, the decisions of the courts of New York upon the subject will be recognized as authority in all the American States, unless in an occasional State there may be a statute changing the rule; and if there should be such an instance it will be noted in a subsequent chapter. But the courts of many of the States have expressly recognized the doctrine of the New York courts upon the subject.

The Supreme Court of Texas has decided that a pawnee, when his debt is due, may foreclose and sell under a judicial sale, or he may sell at auction, without foreclosure, upon giving reasonable notice to the debtor. A stipulation in the contract of pawn, that if the pawn is not redeemed within a specified time, the right of property shall be absolute in the pawnee, the court declared to be of no effect, and did not change the ordinary rule (*Lucketts v. Townsend*, 3 *Tex. R.*, 119).

The Supreme Court of California has held that securities assigned as collateral security for money advanced cannot in general be sold without demand and notice to the assignor. But where the plaintiff had placed certain securities, accompanied by an absolute assignment in writing, in the hands of the defendant in return for money advanced, and was in the habit of directing the defendant to buy his drafts, "when in funds, from the proceeds of securities placed in your hands," the court held that the defendant had full authority to sell such securities without demand or notice, and it was stated that, in general, where securities are

absolutely assigned, the presumption is that, on selling, demand and notice to the assignor is unnecessary (*Hyatt v. Argenti*, 3 *Cal. R.*, 151).

The Supreme Court of Iowa has made a similar decision, holding that where the pledgee executed to the pledgor a receipt for property pledged to secure a note, stating that if the note was not promptly met at maturity the pledgee reserved the right of selling the property at private sale, the proceeds to be applied to pay the debt, and any surplus to be paid to the pledgor, this agreement changed the legal rights of the parties only by dispensing with notice to the debtor to redeem, as prior to the creditor's right to sell. And it was further held that the pledgee in such a case was not bound to sell the pledge at the maturity of the note. But the general doctrine was stated that, after maturity of his debt, the pledgee holding property, to secure the same may either (1) proceed personally against the pledgor, without selling the property, or (2) file a bill in chancery and have a judicial sale under a regular decree in foreclosure, or (3) sell without judicial process, upon giving to the debtor reasonable notice to redeem (*Robinson v. Furley*, 11 *Iowa R.*, 410; *vide Hamilton v. State Bank*, 22 *ib.*, 106).

The Supreme Judicial Court of Massachusetts has held that a sale of a naked pledge can only be made at public auction, with notice to the pledgor of the time and place thereof. And in the same case it was held that if the makers of a promissory note deliver to the payee thereof a bond as collateral security, with authority to pledge it to a third person as collateral security for other notes held by him, on which the payee is liable as indorser; and the same is so pledged accordingly, the payee has no authority to bind the makers by assenting to a sale thereof, without notice to them; and that if he does so assent, and the bond is sold for less than its reasonable and fair value, so that only a small amount is left after paying the notes held by such third person, to apply on the note held by the payee, the makers will only be liable to him or to an indorsee who took it after its maturity for such amount as would remain due, upon accounting for the residue of the full, reasonable and fair value of the bond, after the payment of the last pledgee; and that the fact that after the sale a notice thereof was given by the payee to the makers, with information that they might redeem the bond within thirty days at the same

price and expenses, is immaterial (*Washburn v. Pond*, 2 *Allen's R.*, 434; and *vide Fletcher v. Dickinson*, 7 *ib.*, 23; *Parker v. Brancker*, 22 *Pick. R.* 40).

The Supreme Court of Pennsylvania has laid down the rule in general terms that the bailee of a pledge or pawn must give notice to the pledgor of an intent to sell after default of payment; and also of the time and place of sale, in the absence of a contract to sell *ex mero motu* (*Davis v. Funk*, 39 *Penn. R.*, 243).

The Supreme Court of the State of Connecticut has declared that a creditor having personal property pledged to him as security for his debt, cannot sell the same until he has called on the debtor to redeem; and that he must also give the debtor notice of the time and place of sale (*Stevens v. Hurlbert Bank*, 31 *Conn. R.*, 146).

The Supreme Court of Pennsylvania, in a more recent case than *Davis v. Funk*, decided that the holder of a collateral security cannot appropriate it in satisfaction of the debt intended to be secured, at his own option, unless in pursuance of a contract to that effect, nor sell it without first giving the pledgor notice, in order to redeem (*Diller v. Bunbaker*, 52 *Penn. R.*, 498). And in a still later case the same doctrine was repeated; and in addition it was held that the notice must specify both time and place of the proposed sale (*Conyngham's Appeal*, 37 *Penn. R.*, 474).

In a late case in England it appeared that the plaintiff deposited with the defendant two pictures as security for the payment of his promissory note for five pounds, payable in one month. At the end of the time, August 6th, the defendant demanded the money, and it was arranged that a further time should be allowed for the payment of the note, the plaintiff paying ten shillings per month for the accommodation. On September 17th the defendant wrote the plaintiff that unless his claim of six pounds ten shillings was paid he would sell the pictures, which he accordingly did. The Court of Common Pleas held that a notice that he would sell, unless an excessive sum was paid immediately, was not such a notice as would justify a sale (*Pigot v. Cubley*, 15 *C. B. R. N. S.*, 701).

It has been held in the State of Maryland that an agreement, by the pledgor of shares in the capital stock of a corporation, that the pledgee might sell the stock "without further notice," if the loan it was given to secure was not paid on one day's notice, according to agreement, dispensed with all notice of sale, and only left upon

the pledgee the obligation to sell publicly and fairly for the best price he could obtain (*Maryland, etc., Insurance Company v. Dalrymple*, 25 Md. R., 242; *Baltimore, etc., Insurance Company v. Dalrymple, Ib.*, 269). And the same court held that an agreement, authorizing the pledgee of shares in a corporation "to give the stock to any broker to sell," permits a private sale by a broker for the market price (*Bryson v. Rayner*, 25 Md. R., 424).

The Supreme Court of Illinois had a case before it in which the following were the facts: The plaintiff stored corn in the defendant's warehouse upon the following agreement by the defendant: "February 9th, 1860. We hereby agree to store ear-corn for (the plaintiff) till the first of June next for three cents per bushel; two cents for shelling. If sold before the first of June, we are not to charge for shelling; if not sold by the first of June, we are to charge one-half per cent per month till it is sold. The corn to be good and merchantable." The court held that after the first of June the relation of the parties became analogous to that of pledgor and pledgee, and that upon giving the proper notice to the plaintiff the defendant might then sell the corn at public auction for the charges upon it. And it was further held that, if in such a case the defendant sells the corn in an illegal manner, he will be liable for the value thereof at the time of the demand (*Cushman v. Hayes*, 46 Ill. R., 145).

It may be affirmed that if there is no agreement in the contract of pledge that the pawnee of property shall sell it, he cannot be compelled to do so (*Badlam v. Maker*, 1 Pick. R., 400). And a creditor, holding collateral securities for his debt, need not surrender such securities to the debtor in order to enforce his debt directly against him. The creditor is entitled to hold them until he gets his pay, and then the securities belong to the debtor (*Bank of Rutland v. Woodruff*, 34 Vt. R., 89; and *vide Whitwell v. Brigham*, 19 Pick. R., 117).

In the State of Louisiana, where a party holds goods merely as security for a debt, with a privilege on the same, the courts have held that he has no right to prevent the seizure of the goods by another party also claiming a privilege against the owner, and it was decided that the right of a party holding goods in this manner is limited to a judicial proceeding to make his privilege available against the goods (*Flournoy v. Milling*, 15 La. An. R., 473).

In the State of New York, in a case where it appeared that a

banking association, having borrowed money, gave its certificates of deposit, payable upon time, and in form resembling promissory notes, and also as collateral security for the certificates pledged certain bonds secured by a deed of trust, which bonds and deed had been previously executed for another purpose, the Court of Appeals held that although the certificates of deposit were illegal and void, the parties lending the money had, nevertheless, a right to hold the bonds as security for the money loaned (*Curtis v. Leavitt*, 15 *N. Y. R.*, 9).

The Court of Queen's Bench of England have recently made an interesting decision respecting the rights of a pledgee, in case of a pledge to secure an illegal claim. The plaintiff deposited with the defendant the half of a £50 bank note by way of pledge to secure the payment of money due from the plaintiff to the defendant. The debt was contracted for wine and suppers supplied to the plaintiff by the defendant in a brothel kept by him, to be there consumed in a debauch. The plaintiff having brought an action to recover the half note, the court held that the maxim *in pari delicto potior est conditio possidentis* applied; and that as the plaintiff could not recover without showing the true character of the deposit, and that being on an illegal consideration to which he was himself a party, he was precluded from obtaining the assistance of the law to recover it back (*Taylor v. Chester*, 4 *Queen's Bench R.*, 309).

The Supreme Judicial Court of Massachusetts has lately decided that a pledgee, with power to sell the goods and apply the proceeds on the debt, does not forfeit his lien by employing the pledgor as agent to make the sale, allowing him to contract for it in his own name, and delivering the goods on his order to the purchaser (*Thayer v. Dwight*, 104 *Mass. R.*, 254; and *vide Mather v. Staples*, 5 *Allen's R.*, 34).

The Supreme Court of Pennsylvania has held that an administrator, having assigned to a creditor of the decedent certain claims of the estate as collateral security, there being then no evidence of insolvency, such creditor is not bound to reassign them except on payment or tender of the whole amount due him (*Kithra's Estate*, 17 *Penn. R.*, 416).

In the State of Maryland, a party who had pledged with a bank certain stock, as security for a specific debt, wrote a letter to the bank, authorizing the bank "to hold the stock as a general collate

al security for all the writer's liabilities to the said bank at present existing, or which may hereafter be incurred by him." The court held that the bank, under their authority, had the right, after payment of the specific debt, to apply the surplus of the stock, *pro rata*, to all such liabilities (*Eichelberger v. Murdock*, 10 Md. R., 373).

In the State of Alabama, an agreement by which cattle were to be kept and fed during the winter, and the stock to be liable for the expense of keeping them, with authority to the bailee to sell them to pay such expense, was held by the court to give to the bailee a right to sell so much of the stock as might be necessary to pay him his debt; but if he sold more, it would be a conversion. And it was further held and declared that a purchase by the bailor of property sold at public auction, to enforce a lien of the bailee, is not void; but voidable at the election of the party whose title is sought to be divested (*Whitlock v. Hoard*, 13 Ala. R., 776).

Where a negotiable security is taken as collateral to an existing debt, the holder may endeavor to make it available by a suit; and, failing of success, he may resort to his original remedy, without restoring that taken as collateral. And, indeed, a creditor who has a pledge from his debtor is, in no case, confined exclusively to that security; but may, unless there is some agreement to the contrary, have his action (*Comstock v. Smith*, 10 Shep. R., 202; *Whitwell v. Brigham*, 19 Pick. R., 117).

A bill in equity will lie to obtain the sale of a pledge made to secure an unliquidated demand, without first proceeding at law to ascertain the damages (*Vaupell v. Woodward*, 2 Sand. Ch. R., 143).

Where a pledgee of goods authorizes the pledgor to sell them and pay over the price to him, and the pledgor accordingly sells the goods to a third person, who agrees to make payment to the pledgee, such pledgee has a right of action against the purchaser, and he is liable for the whole price, and cannot set off a debt due him from the pledgor (*Nottebohm v. Maas*, 3 Rob. [N. Y.] R., 147).

In an action by a pledgee against a sheriff for a conversion of goods pledged, it seems that the sheriff who has seized them under lawful writ in his hands will be treated as in privity with the owner, the pledgor, provided he has pursued the law in making

such seizure, and will be held only for the plaintiff's special interest in the goods; but in any other event, he will be treated as a stranger, and held for their full value (*Treadwell v. Davis*, 34 Cal. R., 601).

Where several things are pledged, each is deemed liable for the whole debt or other engagement, and the pledgee may sell them from time to time till the whole debt or claim is discharged. If anything perishes by accident or casualty without his default, he has a right over all the residue for his whole debt or duty, and he may sell not only the things pledged, but also their increments. But when he has once obtained an entire satisfaction, he can proceed no further; and, if there is any surplus, it belongs to the pledgor. And the pledgee may select one of the things pledged without affecting any of his rights over the others. Such is clearly the doctrine of the elementary writers, and the doctrine is universally recognized by the courts (*Vide Story on Bailm.*, § 314, and *authorities cited*; also 1 *Bac. Abr.*, tit. *Bailm.*, B).

The Court of Appeals of the State of New York have recently made an important decision relating to the rights of pledgees. The plaintiff delivered and left with his brokers, as a pledge, a certificate of shares of stock, having indorsed thereon the form of an assignment expressed to be "for value received," and an irrevocable power to make all necessary transfers. The name of the transferee and attorney and the date were left blank. This document was signed by the plaintiff. Subsequently the brokers, without the consent of the plaintiff, pledged the stock to the defendant for a much larger sum than the amount of their lien thereon. The court held that the plaintiff having left the certificate in the hands of the brokers, accompanied by an instrument bearing his own signature, which purported to be for a consideration, and to convey the title away from him, and to empower the bearer of it irrevocably to dispose of the stock, the consequence of a betrayal of the trust imposed on the brokers should fall on him who reposed it. Accordingly, it was further held that the defendant, having advanced *bona fide* on the credit of the shares and of the assignment and power exerted by the plaintiff, was entitled to hold the stock for the full amount so advanced and remaining unpaid, after exhausting other securities received for the same advance (*McNeil v. Tenth National Bank*, 5 *Albany Law Journal*, 43; *S. C.*, 46 *N. Y. R.*, 325).

It is very clear that the parties may waive any mere irregularity

as in the sale of a pledge. In a case before the old Supreme Court of the State of New York, the property pledged was 400 shares of the Mechanics' Banking Association. Default was made on the payment of the debt, and the creditor sold at the board of brokers, after having given the debtor two days' notice of the time and place of the sale. At the time of the notice of the contemplated sale, the pledgor made no objections as to its sufficiency. The court held that, inasmuch as the contract of pledge contained no restrictions as to the mode of selling the stock pledged, and none could be implied from any established custom proved in the case, the sale was properly made at the board of brokers. Nelson, J., in his opinion, said: "The defendant was duly advised of the time and mode of sale, and made no objection to either. If he was not satisfied with a sale at the board of brokers, he should have spoken. His silence indicated an acquiescence, and must have been so understood by all parties concerned. If the sale was fairly made in accordance with the notice given to the defendant (and there is no pretense to the contrary), he should be stopped from disputing its propriety in respect to mode and place" (*Villoughby v. Comstock*, 3 *Hill's R.*, 389, 392). And the Supreme Court of Wisconsin has expressly held that the pledgor's goods may waive the notice of sale to which the law entitles him (*Mowry v. Wood*, 12 *Wis. R.*, 413).

Perhaps it should be added that upon the sale of a pledge, the pledgee cannot be permitted to become the purchaser. This is the rule, and it is regarded as necessary, in order to secure fidelity and good faith on the part of the pledgee.

CHAPTER XLVI.

RIGHTS OF THE PLEDGEE AFTER SALE OF THE PLEDGE — DISTRIBUTION OF THE PROCEEDS OF THE SALE — LIABILITIES OF PLEDGEE IN RESPECT TO NEGOTIABLE PAPER — HIS LIABILITY TO ACCOUNT FOR THE PROPERTY IN PLEDGE.

It is a matter of considerable moment to understand properly what are the rights of the pledgee, after the pledge has been sold, and especially where there may be adverse claims upon the fund produced by the sale. This subject is treated at large in the

Roman law, and Judge Story adverts to a few of the leading distinctions in his work on Bailments.

In the first place, says that distinguished author, those creditors who have what are called privileged debts in the Roman law, that is to say, debts in respect to which a lien or right of preference exists on the property, enjoy a priority of payment, and are to be paid before the pawnee; and privileged creditors of equal rank and degree are to take *pari passu*.

In the next place, those creditors who, as mortgagees or pawnees, have a specific title to the thing, take according to the priority in point of time of their respective titles, unless some peculiar circumstances intervene to vary the rule.

In the next place, if the pledge is for the joint benefit of several creditors, each of them is entitled to share equally with the others according to his debt. But if the thing is pledged severally to two creditors, without any communication with each other, and one of them has obtained the possession, he is entitled to a preference according to the maxims, *In pari causa possessor potior haberi debet*; *In æquali jure melior est conditio possidentis*. In the case of a sale of a pledge, these rules are constantly observed in the distribution of the fund; so that every creditor who possesses a superior right or privilege will be entitled to maintain it, and to receive a full compensation from the fund, before the creditor who holds under a mere contract of pledge from the debtor.

In the next place, if the thing is pledged to one and the same creditor for several debts, and the pledge, when sold, is not sufficient to pay all the debts, the money arising from the sale is to be applied proportionally to all debts, to extinguish the same *pro tanto*. And Judge Story observes, few cases have arisen upon this subject in the common law; and it would be unsafe to rely wholly upon the civil law, as furnishing safe analogies for our guidance. In the absence, however, of any authorities, the civilians may assist our inquiries; and for this purpose Domat, in an especial manner, may be consulted with advantage. Judge Story refers for all these positions to Pothier, Ayliffe, Domat and other writers upon the civil law (*Story on Bailm.*, §§ 312, 313).

It was held by the Superior Court of the city of New York, that where an agent, in getting a note discounted for his principal, leaves, as collateral security, a larger note of his principal having

order time to run, which larger note is paid at maturity, the proceeds thereof are to be applied to the payment of the smaller, when it becomes due; and the balance belongs to the principal and cannot be applied to pay a debt of the agent (*Geffcken v. Lingerland*, 1 Bosw. R., 449).

The question of the proper application of the proceeds of the sale of a pledge was recently before the Supreme Court of Florida. A debtor pledged a quantity of cotton as security for his notes held by a bank, and retained the cotton to be sold, and the proceeds applied to the liquidation of the notes. The cotton was sold, and the proceeds were deposited by R. to his own credit in the bank, and afterward all drawn out by him without directing the bank to the application of these sums to the liquidation of the notes.

The court held that it was too late to demand the appropriation of the balances to the payment of the notes, since R., notwithstanding the existence of the balances after the notes became due, elected to make such appropriation himself (*Randall v. Peters*, Fla. R., 517).

The rule is thus laid down in the civil law: "Where a debtor, owing himself to a creditor for several causes at one and the same time, gives him pawns or mortgages which he engages for security of all debts, the money which is raised by the sale of pawns or mortgages shall be appropriated in an equal proportion to the discharge of every one of the debts" (*Dom., b. 4, tit. 4, pl. 7*). But if the debts were contracted at different times on the security of the same pawns and mortgages, so as that the debtor had mortgaged for the last debts what should remain of the proceeds; after payment of the first, the moneys arising from the proceeds would, in this case, be applied in the first place to the discharge of the debt of the oldest standing. And both in the one case and the other case, if any interest be due on account of the debt which is to be discharged by the payment, the same will be paid thereon any part thereof be applied to the discharge of the principal. *Vide Perry v. Roberts*, 2 Ch. Cas., 84; *Styart v. Rowland*, Bosw. R., 216).

It would seem to be the general principles in respect to the distribution of the proceeds of the sale of a pledge by the pledgee, as stated in the preceding chapter, and such is the law, that where several things are pledged, each is liable for the whole debt under her engagement, and the pledgee may proceed to sell them

from time to time, until the debt or other claim is completely discharged. But in this case the proceeds of the sale are to be disposed of upon the same principles, as where a single thing only is pledged; and any surplus remaining must be paid over to the pledgor.

An interesting case involving this question recently came before the Supreme Judicial Court of the State of Massachusetts. The defendants, who were partners, after pledging goods, with an invoice, as collateral security for a debt owed by them and payable on demand, dissolved the partnership, and, in consideration of the agreement of one Lamb to pay the partnership debts, conveyed to him all the property of the firm, made him their attorney to demand all the partnership effects, and execute releases therefor as fully as the firm might do, and covenanted not to receive or release any demands of the firm or interfere with its affairs without his consent. The pledgee had notice of this contract, but never agreed to substitute Lamb as his debtor. Lamb then paid to the pledgee part of his debt, and took from him, with his consent, what, so far as he knew, or as was shown by the invoice, was a proportional part in value of the pledged goods, though in fact it was a much more valuable portion. Subsequently (Lamb having died insolvent) he made demand on the pledgors for the balance of the debt, and then caused the rest of the goods to be sold by auction, bid them in himself, and rendered to the pledgors an account of the sale. The court held that, in respect to the goods delivered by the pledgee to Lamb, he was not liable to account to the pledgors for any greater sum than Lamb paid to him, and it was further held that he was not entitled to disaffirm the sale of the rest of the goods and return them to the pledgors without their consent; but that he could recover from the pledgors only the balance of the debt after deducting the proceeds of the sale.

Gray, J., who delivered the opinion of the court, regarded the case a very plain one, and, after stating the facts, said: "Under these circumstances, the plaintiff's delivery to Lamb of a portion of the property pledged, on receiving payment of a sum which was, so far as was known to the plaintiff or appeared by his invoice of the goods pledged (though not in fact), a proportional part of his debt, was not such a dealing with or disposition of his collateral security as to make him liable to account with the

defendants for any greater sum than that so received by him from amb.

"But by the plaintiff's subsequent sale by auction and purchase of the rest of the goods pledged, his debt was paid and discharged to the extent of the sum bid by him and stated in his account afterward rendered to the defendants. The balance of his debt, after deducting this sum, he is entitled to recover in this action." Judgment for the plaintiff accordingly (*Faulkner v. Hill*, 104 *Mass. R.*, 38, 191, 192). The debt or engagement for which a pawn or pledge is given is the principal obligation, and the obligor is personally bound to fulfill it, as if no pledge had been given. The result of this principle is, that the creditor may bring an action for the recovery of the debt at any time after it becomes due, without any surrender of the pledge. And if the pawn or pledge be lost, or surrendered to the pawnor or pledgor, or surreptitiously obtained by the latter; or if the pawnee or pledgee convert the pawn or pledge to his own use, and the pawnor or pledgor recover damages from him, on that account, for its value, the original obligation survives (1 *Bow. Inst.*, 425).

Judge Story expresses the rule thus: "The possession of the pawn does not suspend the right of the pawnee to proceed personally against the pawnor for his whole debt or other engagement without selling the pawn; for it is only a collateral security. If the pawnor, in consequence of any default or conversion of the pawnee, has, by an action, recovered the value of the pawn, still the debt remains, and is recoverable, unless, in such prior action, it has been deducted. It seems that, by the common law, the pawnee, in such an action, brought for the tort, has a right to have the amount of his debt recouped in the damages" (*Story on Bailm.*, § 315).

If, upon a sale of the pledge or pawn, the proceeds are more than sufficient to discharge the debt or obligation of the pawnor or pledgor, the pledgee or pawnee must pay over the surplus to the pawnor or pledgor; and this involves the corollary that if the things pawned are insufficient to pay the debt, or other duty, the deficiency continues a personal charge on the debtor, or other contracting party, and may be recovered accordingly; because, although the security covers, yet the duty remains, inasmuch as the money lent, or the debt, remains unpaid. And in a case where the opposite view was insisted on by the counsel for the defendant,

the court, after proof of many particulars to induce a belief that in these loans no regard was had to the personal security, left it to the jury upon this point, that when money is generally lent upon a pledge, the law will not deprive the lender of his remedy against the person; and that to discharge the person of the borrower, there must be a special agreement to stand to the pledge only (*South Sea Company v. Duncomb*, 2 Str. R., 919).

Mr. Corbett cites a case from a MS. Year Book, temp. Edw. I, in Lincoln's Inn library, in which a defendant, in an action of debt for money lost, pleaded that she had deposited jewels with the plaintiff as a security for the repayment of the loan, which jewels the plaintiff had not returned. The court refused to give judgment for the plaintiff, saying that they had no power to award restitution of the deposits (*Cod., lib. 8, tit. 14, l. 20, 24*). And in a case before Lord Redesdale, in 1803, the defendant, a mortgagor, moved for an injunction to restrain the plaintiff, or mortgagee, from proceeding at law on the bond while suing in equity for a foreclosure. The deeds had got into the possession of the mortgagee's wife, who was at variance with her husband, and her attorney claimed a lien upon them. The lord chancellor said that though a mortgagee had a right to proceed on his mortgage in equity and his bond at law at the same time, the mortgagor also had a right not to be obliged to pay the money on his bond if he is in danger of not getting back his title-deeds; for the mortgagee can have nothing but on condition of reconveying and giving up the title-deeds which he has received. His lordship granted an injunction to stay proceedings at law, and the money to be paid into the bank, to remain until the title-deeds were secured and reconveyance had; the defendant to pay the costs (*Schoole v. Sall*, 1 *Schoal and Lefroy's R.*, 177). And Story mentions several cases decided by the Supreme Judicial Court of Massachusetts, to the effect that if a pawnee causes the pawned goods to be attached in a personal suit against the pawnor for the very debt for which they were pledged, the right to the pledge is gone; though not if the suit was brought to recover *another* debt than the one secured by the pledge. And, further, that the pawnee has no right to attach other property of the pawnor for the debt secured by the pawn, without first returning the pawn to the pawnor (*Story on Bailm.*, § 366).

But notwithstanding the weight of these authorities, it may be

regarded as reasonably clear that the possession of the pawn is not, of itself, a bar to proceedings against the pawnor, on his personal liability to the pawnee, although it is possible there might be equitable circumstances in a given case which might qualify the general rule in such cases. Certainly, there can be no doubt that where there has been a fair sale of the pledge, and the proceeds are insufficient to liquidate the demand, the pledgee may have an action against the pledgor for the balance.

It has been often held that a chattel or chose in action, pledged for the payment of a debt, is not released from the pledge by the creditor committing the debtor's body to prison upon an execution for the debt; and upon the same principle the debtor is personally responsible for the payment of the debt or performance of the obligation which the pledge is made to secure; and all that he can claim of the pledgee is, that he return the pledge or account to him for the same (*Vide Morse v. Woods*, 5 N. H. R., 297; *Hapman v. Clough*, 6 Vt. R., 123; *Trotter v. Crocket*, 2 Porter's R., 401; *Sellick v. Munson*, 2 Ark. R., 150).

The pawnee must not only account to the pawnor for the entire proceeds of the sale of the pawn, but he must render an account of all income, profits and advantages derived by him from the pledge, when such an account is within the scope of the bailment, charging against these the incidental expenses incurred in respect to the pledge. Pothier thinks that the pawnee goes further, and that he is bound to account for all the profits and income which he might have received from the pledge but for his own negligence (*Pothier, De Nantissement*, n. 36; *Ayliffe, Pand.*, b. 4, tit. 18, p. 133). It has been said that this would doubtless be true, in the common law, in all cases where there is an implied (or express) obligation to employ the pledge at a profit; as if there is a pledge of money, and it is agreed that it shall be let out at interest by the pawnee and he has neglected his duty, or if the pledge is to be employed in its usual business, upon profit, as, for example, a ferry-boat at a ferry, or a coach and horses in the customary carriage of passengers (*Story on Bailm.*, § 343).

When slavery existed in the southern States it was customary to put in pawn a slave to secure a debt or loan; and in such cases it was held that the pawnee was bound to account for the services of the slave, or rather for the net profits of the slave's labor (*Hinson v. Holliday*, 1 N. C. Law Journal, 87). And the same rule

would apply where the pledge consists of cows, horses or other cattle, provided it could be reasonably implied from the contract of pledge that the pawnee is to have the use and labor of the animals. And Judge Story understands that the Roman and foreign law, in all cases of this sort, implies an obligation, to account, from the very nature of the pledge (*Story on Bailm.*, § 343).

And Story says that there was a peculiar sort of pledge or mortgage in the Roman law called *Antichresis*, whereby the creditor was entitled to take the profits of the pledge; as, for instance, of lands or animals, as a compensation for and in lieu of interest. This mode of contract was not held illegal in the Roman law, unless it was made a cover for some illegal act or for some oppressive usury. But in the modern continental nations it seems, from its tendency to give the creditor an oppressive power and to cover usury, to be generally discountenanced; for in all such cases the party is bound to account for the profits, deducting his expenses, and then is simply allowed his interest. This was, at least, the rule at the time Mr. Justice Story got out his celebrated Commentaries on the Law of Bailments, and probably the subject is still regarded in the same light (*Story on Bailm.*, § 344).

It is not very probable that the courts would apply the doctrine of trusteeship, inculcated by Pothier, to the extent that the pledgee shall account for all the profits and income which he *might* have received from the pledge but for his own neglect, unless there be an express agreement to that effect, or an irresistible implication, from the circumstances of the case, that the pledgee shall use the pledge to advantage. It is sufficient, in ordinary circumstances, that the pledgee shall account for the profits of the pawn he has actually employed, being allowed, at the same time, for his loss of time, skill and trouble on account of the pledge. This is the doctrine which has been applied in cases of another nature, but involving this same principle, and there seems to be no good reason why it should not be applied to cases of pawn. As a general thing, the matter will be determined by the express agreement of the party, excepting where it shall appear that the pawnee has actually derived advantages from the pledge, when he must account for the same. Upon this subject the authorities are, in the main, quite harmonious.

The Supreme Court of the State of Indiana has held, in respect to the pledge of negotiable paper, that where a creditor holding

such paper against third parties as collateral security, to be applied in payment of his claim, fails to realize on them, through his own laches, his debtor has a right to consider it satisfied, declaring that it is incumbent on the creditor, in such case, to show reasonable diligence in attempting to collect them (*Slevin v. Morrow*, 4 *Ind. R.*, 425). And the Court of Common Pleas of the city of New York has very properly held that, where a note was placed in the creditor's hands before maturity by a debtor, to be collected and applied by him to a debt due him by such debtor, a subsequent agreement by the debtor to compromise the note for less than the face of it will not bind the creditor and pledgee, unless notified by him (*Grant v. Holden*, 1 *E. D. Smith's R.*, 545).

In a case involving this principle, before the present Supreme Court of the State of New York, the manner in which the pledgee of negotiable paper ordinarily holds the same was examined. The plaintiff took two notes against A. as collateral security for the payment of a debt against B. One of the notes he transferred to C., who obtained judgment thereon. The other was prosecuted to judgment by the plaintiff himself, and both judgments were subsequently assigned by the respective plaintiffs to D. It did not appear upon what terms the first note was transferred to C. and the judgment upon it assigned to D., nor upon what terms the plaintiff assigned his judgment to D. The court held that, by intendment of law, the transfers were absolute and without recourse to the plaintiff; and that, therefore, the principal debt must be regarded as satisfied to the plaintiff out of the collateral securities. It was also held that it would be presumed that the note and judgments were transferred for the full amount appearing to be due upon their face; but that if, in fact, they were transferred for less, it would be at the creditor's own loss, and he would be regarded as having elected to accept satisfaction out of the collateral, and would be bound by such election, and could not afterward resort to the principal to make up the deficiency. And it was declared to the effect that a creditor holds collateral securities as the agent or trustee of his debtor, and whenever he undertakes to transfer them without the authority of the principal debtor, the law will hold that he has elected to take them for what appears to be due on their face, in satisfaction, to that extent, of the principal debt (*Hawks v. Hinchcliff*, 17 *Barb. R.*, 492).

The general rule of law, where a person receives bonds and

notes for collection, as collateral security for a debt, is that he is bound to use due diligence; and if they are lost through his negligence, by the insolvency of the makers, he is chargeable with the amount (*Noland v. Clark*, 10 *B. Mon. R.*, 239). But the following case came before the Supreme Court of the State of New Hampshire: The defendant pledged as collateral security for a debt due the plaintiff two notes, amounting to about seventy dollars, which the plaintiff was to collect, and deduct therefrom the sum due him. The maker possessed ample property, from which the notes might have been collected, and the plaintiff delayed enforcing payment of them for five months, at the end of which time the maker became insolvent. It was not suspected that the maker of the notes was embarrassed, nor did the defendant request the plaintiff to collect the notes. Under these circumstances the court held that the pledgee was not chargeable with the amount of the notes, and that he had his action against the pledgor for the amount of his debt, which the notes were taken to secure (*Goodale v. Richardson*, 14 *N. H. R.*, 567).

And in the State of Indiana, in a case before the Supreme Court, it appeared that a judgment debtor deposited with the judgment debtor's attorney certain claims as security, taking receipts therefor, in which the attorney engaged to apply so much of the proceeds as he should be able to collect to the payment of the judgment. The court held, in a suit in chancery by the debtor, that he was not entitled to a credit for the said claims until they were collected, unless they had been lost, or had remained uncollected through the creditor's negligence (*Kiser v. Ruddick*, 8 *Blackf. R.*, 382).

The Supreme Court of Louisiana has held that where a note is deposited as a pledge, and it was shown that the maker was good or solvent for some time after the maturity of the note, the pledgee will be responsible for the amount. And this, on the ground that the note must be presumed to have been paid or its amount lost by the neglect of the pledgee (*Commercial Bank of New Orleans v. Martin*, 1 *La. An. R.*, 344). And the same court held that one who lends to an agent money for his private use, and receives from him, as security for its repayment, a pledge of a claim against a third person, known by the lender to belong to his principal, the amount of which he afterward receives, will be bound to account to the principal for its amount (*Reeves v. Smith*, 1 *La. An. R.*, 379).

The Supreme Court of Michigan has held that where a party gives negotiable paper from his debtor, with the debtor's endorsement, as collateral security for his demand, and not as a mere loan, it is his duty to present the same for payment when due, and take the proper steps to charge the debtor as indorser; that, failing to do this, he makes the paper his own (*Jennison v. Parker*, 7 Mich. R., 355). And the Supreme Court of Wisconsin has decided that where negotiable paper is received in pledge as collateral security for the payment of a debt, the pledgee may collect the debt, and that he will be held responsible to the pledgor for the balance remaining after the satisfaction of the debt secured thereby (*Stanton v. Waring*, 3 Wis. R., 492). But the Supreme Court of Michigan has lately held that a pledgee of choses in action, pledged as collateral security, who has entered into no obligation to collect the debt, is not chargeable with a want of diligence; but that he will be held accountable for all sums collected by him through any agency employed therefor (*Rice v. Benedict*, 19 Mich. R., 132).

The Superior Court of the city of New York has decided that a creditor receiving from his debtor, as collateral security, a promissory note made by a third person, past due, with the request to collect it, and apply the proceeds to the payment of the debt, although without any express direction to sue upon it, incurs the obligation to use diligence in its collection, and to sue if necessary. In such case, the debtor stands in the relation of guarantor for the collection of the note, and is entitled to the exercise, on the part of the holder, of such diligence as is required of a bailee for hire of a pledgee. It was said that the degree of diligence required must be determined from the facts and circumstances of the case as a question of law. And in the case before the court, it appeared that the creditors received such a note as collateral security at a time when the makers were abundantly able to pay it; and on their demanding payment, the latter intimated that they had a defense; but the creditors neither notified the debtor thereof nor brought suit on the note until three months thereafter, and meanwhile the makers had become insolvent, whereby the amount of the note was lost. The court held, under these circumstances, that negligence was imputable to the pledgees, and that they were liable to the pledgor for the amount of the note, and could not recover from him their costs of obtaining judgment against the

makers (*Wakeman v. Grady*, 10 Bosw. R., 208; and *vide Foote v. Brown*, 2 McLean's R., 369).

If the pledgee sells the pledge fairly and publicly, and in the manner prescribed by law, he is not answerable for the loss from its selling for less than its estimated value. But an improper sale by the pledgee, whereby the pledge brings less than it should, is a conversion, for which the pledgor may have damages. And if the sale was improperly made, it is immaterial in law that the pledgor presently bought them from the purchaser at about the same price for which the pledgee sold them. This was so held by the Supreme Court of the State of Wisconsin, in a case involving the question (*Ainsworth v. Bowen*, 9 Wis. R., 348). The defendant, who, as a bailee, had received certain money to be held as security for the payment of a debt, was held to be under no obligation to return it until demand made, or, at the least, until notice that the debt, as security for which he held the pledge, had been paid by the plaintiff (*Demart v. Masser*, 40 Penn. R., 302).

Where the pledgee has not expressly agreed to sell the pledge when the debt becomes due which it was made to secure, he is not bound to sell the same at that time. And in such a case, the pledgee is not responsible for a depreciation in value of the pledge, occurring between the maturity of the debt which the pledge was given to secure and the sale; that is, if he used the diligence of a careful man in charge of his own property. This is the doctrine settled by the Supreme Court of Iowa (*Robinson v. Hawley*, 11 Iowa R., 410). A pledgee of stocks mingled them with others of the same kind, owned by himself, so that they could not be distinguished, and then, after giving notice to the pledgor, sold a number of shares equal to the number pledged. The Supreme Court of Mississippi held that, under these circumstances, the pledgee was only bound to charge himself with the price received at this sale, and not with a higher price at which the same stock was afterward sold (*Berlin v. Eddy*, 33 Miss. R., 426). Under the statute of Minnesota it has been held that one who has taken security for a debt, as therein provided, may bring his action on the original claim, in the first instance, holding himself ready to prove that in fact he had no security, and will not be put to a useless expense and delay simply for the purpose of demonstrating this by a judicial decision; but by their admission of the assignment to them of such security, it was held that they

t themselves out of court, until they either show that it washausted before bringing suit or that it was valueless (*Schalck v. Armon*, 6 *Minn. R.*, 265).

The Court of Appeals of the State of New York have held it where a pledgee sells the pledge without giving the requisite tice, he is guilty of a conversion of the property pledged, and at the proper rule of damages, in an action brought by the idgor against the pledgee for such conversion, is the highest ice of the property between the time of the conversion and the al (*Markham v. Jardon*, 41 *N. Y. R.*, 235).

The late Court of Chancery of the State of New York held it if a demand against a third person be good when pledged as llateral security, and the amount be lost through the subsequent solvency of such third person and the neglect of the creditor, the iditor is chargeable with the amount (*Barrow v. Rhinlender, Johns. Ch. R.*, 614).

It is held that a person may relinquish a collateral security ren to him by his debtor, without the consent of the other credi- s of the debtor, and not thereby lose his resort against the btor's property, though he might be liable to the debtor if the urity was lost by his negligence. And although such creditor also a nominal trustee for the creditors of the debtor, it is held at that would not affect his claim against the trust estate, if he s not violated his duty as trustee. Nor, if afterward such iditor take the bond of the original debtor, and another bond two others as collateral security for his advances, and then ease the latter, but with a stipulation that it should not affect e liability of the original obligor, is his claim against the trust nd affected. But it was held in the case to be clear that, ere the money is advanced after the sale of the goods pledged, e claim of the advancing creditor is not affected by having rted with the goods. So held by the Supreme Court of Penn- vania (*In the matter of Dyett, 2 Watts & Serg. R.*, 463).

A bank made a loan, and took a pledge of the borrower's shares its stock, as collateral security, with a power of sale if pay- nt should not be made according to the terms of the loan. ter the borrower's death, the bank sold the shares by auction, non-payment, became the purchaser, gave credit for the amount the sale, and claimed the balance of the borrower's administra- , who refused to sanction the proceeding. The Supreme Judi-

cial Court of Massachusetts held, in such a case, that nothing passed to the bank by this form of sale, but that it still held the shares under its original title as collateral security (*Middlesex Bank v. Minot*, 4 Met. R., 325).

A similar doctrine to this last has been laid down by the Supreme Court of the State of Iowa. The plaintiff loaned to the defendant \$20,000, for which it gave its acceptances, payable at its office in the city of New York in 90 and 120 days; and to secure the payment of the sum at maturity, according to agreement, forwarded to the plaintiff thirty-four "land-grant construction bonds" of the defendant, of \$1,000 each. The acceptances were protested for non-payment, and remained unpaid. The plaintiff sent the bonds of the defendant to the city of New York, with directions to have them sold at the stock exchange in the city at public outcry to the highest bidder, and directed a friend to see that the interests of the plaintiff were protected in the sale. Upon due notice to the defendant, the bonds were sold and bid in for the plaintiff at the sum of \$5,477.86. In an action on the acceptances to recover the balance due, after deducting the amount realized by the sale of the bonds, it was held that the plaintiff had power to sell the bonds to a third person for the payment of the debt, but that it could not itself become the purchaser; and that the bonds must be considered as still held by the plaintiff, under its original title, as collateral security for the payment of the money borrowed by the defendant (*Bank of Old Dominion v. Dubuque, etc., R. R. Co.*, 8 Clarke's R., 277).

But the Court of Common Pleas of the city of New York has held that, where property is pledged to a firm, a special partner of said firm may, if he wishes, at a sale made by the pledgees, become a purchaser of the property which is pledged (*Lewis v. Graham*, 4 Abb. Pr. R., 106).

In a case before the old Supreme Court of the State of New York, hereinbefore referred to upon another point, it appeared that the defendant gave his note to the plaintiff at four months for a precedent debt, and at the same time delivered to him certain merchandise as collateral security for the debt, which the plaintiff, after the note fell due, sold at auction for less than its value, without notice to the defendant, and without calling upon him to redeem, and then sued the defendant for the balance of the note. The court held that the defendant was entitled to have the full value of

merchandise, and not merely the proceeds of the sale applied to the payment of the note. And where, in such case, it appeared that the value of the property was equal to the amount of the note, the court held that the defense was admissible under the plea *non-assumpsit*. Of course, the decision was based upon the presumption that the sale of the pledge was illegal for the want of proper notice; and hence, that the sale was a conversion of the property, rendering the pledgee liable for the full value of the note (*Stearns v. Marsh*, 4 Denio's R., 227).

CHAPTER XLVII.

DUTIES AND OBLIGATIONS OF THE PLEDGEE IN RESPECT TO THE PROPERTY PLEDGED — CARE AND DILIGENCE REQUIRED — PRESUMPTIONS IN CASE OF THEFT — MEANING OF ORDINARY CARE, AS UNDERSTOOD IN SUCH CASES.

It is often a very important question to determine the duties and obligations of the pawnee in respect to the property which he has received in pledge. That is to say, where the pledge consists of negotiable paper it is important to understand what care and diligence the pledgee is expected to use in securing and collecting the same; and where the pledge consists of goods and chattels, it is equally important to understand what degree of diligence is imposed upon the pawnee in respect to the preservation of the pawn. Both pawnor and pawnee have an interest in the pawn, and they are mutually interested in having the subject of the pawn properly cared for. But the possession of the property pledged is in the pledgee, and, therefore, a degree of diligence and care must necessarily be exercised by him in respect to it.

According to the elementary writers and the judicial authorities, the pawnee is required to use ordinary diligence in respect to the pawn, and, consequently, he would be liable for ordinary neglect in relation to it. This is the rule laid down by Bracton, Sir William Blackstone and Lord Holt; and this would also seem to be the rule of Roman law, although the point of responsibility is stated in the Roman law to be, where there is deceit and negligence on the part of the pawnee. *Dolum et culpam, etc., pignori acceptum*, is the

language (*Dig., lib. 50, tit. 17, l. 23*). *Sed ubi utriusque utilitas vertitur, ut in empto, ut in locato, ut in dote, ut in pignore, ut in sociatate, et dolus et culpa præstatur*, is another passage from the same Digest (*Dig., lib. 13, tit. 6, l. 5, § 2, Ib., tit. 7, l. 13, 14*). *Ex igitur, quæ diligens paterfamilias in suis rebus præstare solet, a cinditore exiguntur*, is still another passage from the same great work (*Dig., lib. 13, tit. 7, l. 14*). And a fourth passage may be quoted: *Quia pignus utriusque gratiâ datur, etc., placuit sufficere, si ad eam rem custodiendam exactam diligentiam adhibeat* (*Inst., lib. 3, tit. 15, § 4; Ayliffe, Pand. B, tit. 1, p. 531*). Judge Story says that the same rule of ordinary diligence is understood to be adopted in modern times in the principal countries of continental Europe and in Scotland, and it has the express sanction of Pothier and other writers of acknowledged authority (*Story on Bailm., § 332, and authorities cited*).

Sir John Holt, who is always quoted with respect, and from whom no English lawyer ventures to dissent without extreme diffidence, has taken a comprehensive view of the whole subject of what is required of the bailee in respect to the property in his care, in his judgment in a celebrated case which is often cited, and upon the point under consideration he says: "As to the fourth sort of bailment, viz., *vadium*, or a pawn, in this I show two things; first, what property the pawnee has in the pawn or pledge; and, secondly, for what neglect he shall render satisfaction. As to the first, he has a special property; for the pawn is a securing to the pawnee that he shall be repaid his debt, and to compel the pawnor to pay him. But if the pawn be such as it will be the worse for using, the pawnee cannot use it, as clothes, etc.; but if it be such as will be never the worse, as if jewels for the purpose were pawned to a lady, she might use them. But then she must do it at her peril; for, whereas, if she keeps them locked up in her cabinet, if her cabinet should be broke open and the jewels taken from thence, she would be excused; if she wears them abroad, and is there robbed of them, she will be answerable. And the reason is, because the pawn is in the nature of a deposit, and, as such, is not liable to be used. And to this effect is *Ow., 123*. But if the pawn be of such a nature as the pawnee is at any charge about the thing pawned, to maintain it, as a horse, cow, etc., then the pawnee may use the horse in a reasonable manner, or milk the

; etc., in recompense for the event. As to the second point, *cton*, 99, b, gives you the answer: *Creditor, qui pignus accepit, obligatur, et ad illam restituendam tenetur; et cum hujusmodi in pignus data sit utriusque gratia, scilicet debitoris, quo pignus ei pecunia crederetur, et creditoris quo magis ei in tuto creditum, sufficit ad ejus rei custodiam diligentiam exactam, habere, quam si praestierit, et rem casu amiserit, securus esse sit, nec impediatur creditum petere.* In effect, if a creditor as a pawn, he is bound to restore it upon the payment of the t; but yet it is sufficient if the pawnee use true diligence, and will be indemnified in so doing; and notwithstanding the loss, he shall resort to the pawnor for his debt. Agreeable to this 19 Ass., 28, and Southcote's case. But, indeed, the reason en in Southcote's case is, because the pawnee has a special pro-ty in the pawn. But that is not the reason of the case; and re is another reason given for it in the Book of Assize, which ndeed the true reason of all these cases, that the law requires hing extraordinary of the pawnee; but only that he shall use ordinary care for restoring the goods. But, indeed, if the ney, for which the goods were pawned, be tendered to the wnee before they are lost, then the pawnee shall be answerable them; because the pawnee, by detaining them after the tender he money, is a wrong-doer, and it is a wrongful detainer of the ds, and the special property of the pawnee is determined. d a man that keeps goods by wrong must be answerable for m at all events; for the detaining of them by him is the reason the loss. Upon the same difference, as the law is in relation to vns, it will be found to stand in relation to goods found" (*Coggs Bernard*, 2 *Ld. Raym. R.*, 909, 915 *et seq.*).

Upon this point Sir William Jones observes: "As to the ree of diligence which the law requires from a *pawnee*, I find self again obliged to dissent from Sir Edward Coke, with whose nion a similar liberty has before been taken in regard to a *deposi-y*; for that very learned man lays it down, that 'if goods be ivered to one as a *gage* or *pledge*, and they be *stolen*, he shall discharged, because *he hath a property* in them; and, *therefore*, ought to keep them *no otherwise than his own*' (1 *Inst.*, 89, a; *2ep.*, 83 b). I deny the first proposition, the reason and the clusion. Since the bailment, which is the subject of the pre- t article, is beneficial to the *pawnee* by securing the payment

of his debt, and to the *pawnor* by procuring him credit, the rule which natural reason prescribes, and which the wisdom of nations has confirmed, makes it requisite for the person to 'whom the gage or pledge is bailed to take *ordinary* care of it; and he must consequently be responsible for *ordinary* neglect. This is expressly holden by Bracton (*Bract.*, 99); and when I rely on his authority, I am perfectly aware that he copied *Justinian* almost word for word; and that Lord Holt, who makes considerable use of his treatise, observes, three or four times, 'that he was an *old* author;' but although he had been a civilian, yet he was also a great common lawyer, and never, I believe, adopted the rules and expressions of the *Romans*, except when they coincided with the laws of *England* in his time; he is certainly the *best* of our juridical classics; and as to our *ancient* authors, if their doctrine be *not law*, it must be left to mere historians and antiquarians; but if it remains unimpeached by any later decision it is not only equally binding with the most recent law, but has the advantage of being matured and approved by the collected sagacity and experience of ages" (*Jones on Bailm.*, 86, 87). This doctrine will be found to be the recognized rule at the present day, as illustrated by the cases, a few of which may be referred to.

When the pledgee of a note, after obtaining a judgment upon it, and taking out a *fiери facias*, which was returned unsatisfied, omits to sue out a *capias ad satisfaciendum* against the debtor, the Supreme Court of Louisiana held that he will not, in the absence of any proof of injury from such omission, or of any request by the pledgor to take out the latter process, be considered as having thereby rendered himself responsible for the amount of the note.

It was also decided, in the same case, that where it becomes necessary for a pledgee, in the exercise of the diligence required of him, to employ an agent, on account of his particular profession and skill, he will not be responsible for the neglect or misconduct of the latter, where reasonable care was shown in the choice of the agent, as to his skill and ability (*Succession of Hillegsborg*, 1 *La. An. R.*, 340). This is undoubtedly a correct rule as to the liability of the pledgee for the acts of the agent or attorney he may employ in respect to the pledge, and it is very important to the safety of the pledgee.

The general rule is declared to be, by the Supreme Court of

Georgia, that where a party receives a note as collateral security for a debt, without any special agreement, the party receiving such note must use ordinary care and diligence in collecting it; and if any loss should happen to the other party by reason of a want of such care and diligence, the law will compel him to make good the loss; but if there is any special agreement between the parties, then they will be bound by such special agreement, and not by the general rule (*Lee v. Baldwin*, 10 Geo. R., 208).

In an early case before the present Supreme Court of the State of New York, the facts were these: One Wilbur, being indebted to the Kingston Bank, borrowed of the plaintiffs their notes, which he left with the bank as collateral security for his indebtedness, with notice to the bank that they were mere accommodation notes. He also left with the bank, as collateral security for the same debt, a note of one Swift, which was business paper. Subsequently the bank discounted the Swift note for Wilbur, and applied the avails toward Wilbur's debt. The Swift note not being paid when due, it was sued by the bank, and an arrangement was made between the bank and the parties to that note, whereby the note was discharged, and a bond taken in its place. The bond was conditioned for the payment of a sum certain, at a future day, but was given with a secret agreement that it should be satisfied if the bank should recover of the plaintiffs the debt owing by Wilbur. The bank did so recover of them; then, on the plaintiffs' requisition, assigned to them the claim against Swift. That claim was unavailable to the plaintiffs, because the note of Swift had been discharged by taking the bond, and the bond was discharged by the subsequent act of the bank. The plaintiffs, having paid their notes in ignorance of the arrangement as to the Swift note, brought their suit to recover of the bank the amount due on the last mentioned note. The court held, 1st. That the bank held the claim of the Swift note primarily for their own security, and next for the indemnity of the plaintiffs; and that the bank had no right so to deal with it as to impair that indemnity. 2d. That having impaired the indemnity to which the plaintiffs were entitled, by so treating the Swift claim as to make it entirely unavailable to all parties, the bank was bound to account to the plaintiffs for the amount of that claim (*Chester v. The Kingston Bank*, 17 Barb. R., 271).

This case would seem to have been decided correctly, beyond

reasonable doubt, but it was nevertheless taken to the court of last resort, and there very ably argued, and the judgment of the Supreme Court unanimously affirmed. The doctrine of the case, as decided in the Court of Appeals, appears to be, that where a creditor makes an agreement by which a security is rendered valueless to a surety who is entitled to be subrogated in respect thereto, the surety who has paid the creditor, after a judgment obtained against him in ignorance of such agreement, is entitled to recover from the creditor the amount of the defeated security (*Chester v. The Kingston Bank*, 16 N. Y. R., 336).

The Supreme Court of the State of Alabama has declared the following doctrine: If a debtor deposits with his creditor, unconditionally, notes against a third person as collateral security, the latter thereby acquires the control and direction of their collection, and it becomes his duty to take all necessary measures to prevent the discharge of any of the parties thereto, and in such case notice to bring suit on them should be given to him. And if the creditor receives the notes under a special agreement, by which he is not to sue, but to collect in any other mode, he must, as to all persons without notice of the extent of his powers, be regarded as the general holder, and notice to sue may be given to him (*Pickens v. Yarborough*, 26 Ala. R., 417). And the same court held in another case that, under such circumstances, the pledgee is bound to the use of due diligence in the collection of a note so taken, and is responsible to his debtor for any damages caused by his laches; but if the note is on an insolvent person, its retention for never so long a time will not authorize the inference of payment of the original debt (*Powell v. Henry*, 27 Ala. R., 612).

The Supreme Court of California has laid down the rule that a pledge is a bailment which is reciprocally beneficial to both parties, and therefore the law requires of the pledgee the exercise of ordinary diligence in the custody and care of the goods pledged, and he is responsible for ordinary care. And it appeared in the case before the court that the bailors agreed that the goods should be stored in a certain warehouse at their risk and expense; it was held that their removal, by an agent of the bailees, though without their knowledge, made them liable for the safe keeping of the goods after their removal (*St. Losky v. Davidson*, 6 Cal. R., 643).

The Supreme Court of Illinois recently made a decision which incidentally involved this point. It was held that a pledgee of

stock is not bound to sell the pledge on a default, nor is he liable because it afterward depreciates; that the power to sell is his privilege only; to protect himself against a depreciation the pledgor should redeem (*Rozet v. McClellan*, 48 Ill. R., 345).

And the Supreme Court of Pennsylvania has held that where a creditor holds a *chose in action* as collateral security for the payment of his debt, he is not bound to pursue its collection; and if lost, that it is the loss of the debtor (*Smouse v. Bail*, 1 Grant's Cases, 397).

The Supreme Court of Georgia holds that a creditor receiving a note as collateral security from his debtor and suing it in his own name does not therefore become surety for the maker, but is only bound to use due diligence in the collection (*Cardin v. Jones*, 23 Geo. R., 175). But the Supreme Court of Tennessee has very properly decided that a creditor who takes from his debtor an assignment of claims in favor of his debtor against third parties as collateral security for his debt, to be applied to the payment of the same, is liable for any of those claims that are lost by reason of his negligence (*Ward v. Morgan*, 5 Sneed's R., 79).

The Supreme Court of Maine has recently decided that a bank is bound to take ordinary care only of United States bonds, which are pledged by the owner as collateral security for the payment of a note discounted by the bank (*Jenkins v. The National Village Bank of Bowdoinham*, 10 Am. Law Reg., N. S., 598; S. C., 58 Maine R., 275).

The Supreme Court of Pennsylvania has decided that where a creditor, holding collateral security as a consideration for extension of time, accepts additional collaterals, which he agrees to prosecute to collection or insolvency, and to apply the proceeds as fast as collected to the extinguishment of the original debt, and to surrender and give up the same amount of the original collateral bonds, it is the duty of the debtor to demand the surrender of the bonds; and that without a demand on the creditor or the offering him an opportunity to surrender the bonds, he is not liable to the debtor for any depreciation of the bonds during the time they remained in his possession after they might have been demanded (*Williamson v. McClure*, 37 Penn. R., 402).

If a pawnee or other person having charge of the property of another so confounds it with his own that it cannot be distinguished, he must bear all the inconvenience of the confusion. If

he cannot distinguish and separate his own, he will lose it. And if damages are given to the plaintiff for the loss of his property, the utmost value will be taken (*Hunt v. Ten Eyck*, 2 Johns. Ch. R., 62; *Same principle*, *Ringgold v. Ringgold*, 1 Hen. & Gill's R., 11).

Story lays down the rule in general terms that, in every case where the pledge has suffered any injury by the default of the pledgee, the owner is entitled to a recompense in proportion to the damages sustained by him. But, he adds, in estimating the damages, no compensation is to be made for any injury which has arisen by accident or from the natural decay of the pledge (*Story on Bailm.*, § 351).

It is the duty of the pawnee, as before stated, to return the pledge and its increments, if any, after the debt or other duty has been discharged (*Isaack v. Clarke*, 2 Bulst. R., 306). But this duty is by the common law extinguished when the pledge is lost by casualty or other unavoidable accident, or where it perishes through its own intrinsic defect, without the default of the pawnee. This doctrine was clearly stated by Lord Holt in the celebrated case before referred to (*Coggs v. Bernard*, 2 Ld. Raym. R., 909). The same rule applies where the pawn is lost by robbery or by superior force, or even by theft, if the pawnee has exercised reasonable diligence. This was also Lord Holt's view of the law, and the doctrine seems to be fully established. Sir William Jones, however, maintained that private theft is presumptive evidence of negligence, and that in case the pledge proves to have been stolen and the circumstances of the larceny are not shown to exculpate the pawnee from blame, he will be responsible for the loss. But in this he is probably in error. The true principle, supported by the authorities, seems to be that theft, *per se*, establishes neither responsibility nor the reverse in the bailee. If the theft is occasioned by any negligence, the bailee is responsible; if without any negligence, he is discharged. Ordinary diligence is not disproved, even presumptively, by mere theft; but the proper conclusion must be drawn from weighing all the circumstances of the particular case (*Story on Bailm.*, § 338). And this is the doctrine laid down by the learned commentator, Chancellor Kent, in his world-renowned Commentaries upon American Law (2 *Kent's Com.*, § 40, pp. 580, 581, 4th ed.). Sir William Jones, on the authority of Mr. Justice Cottesmore, says: "Now, it has been proved that 'a

lee cannot be considered as using *ordinary* diligence who suffers the goods bailed to be taken by *stealth* out of his custody; it follows that 'a pawnee shall *not* be discharged if the pawn simply *stolen* from him;' but if he be forcibly *robbed* of it *without fault*, his debt shall not be extinguished" (*Jones on Bailm.*, . But the rule, as at present recognized, is, as before stated, in respect to the fact of *theft* being presumptive of neither negligence nor the reverse.

Sir William Jones very properly advances the doctrine: "If, indeed, the thing pledged be taken *openly* and *violently* through *fault* of the pledgee, he shall be responsible for it; and after tender and refusal of the money owed, which are equivalent to actual payment, the whole property is instantly re-vested in the pledgor, and he may, consequently, maintain an action of trover. It is said, in a most useful work, that by such tender and refusal the thing pawned 'ceases to be a pledge, and becomes a deposit.' But there must be an error of impression, for there can never be a *deposit* without the owner's consent, and a *depository* would be chargeable only for *gross* negligence; whereas the pawnee, whose special property is determined by the wrongful detainer, becomes liable, *in all possible events*, to make good the thing lost, or to relinquish the debt" (*Jones on Bailm.*, 91, 92). The learned author refers to Buller's *Nisi Prius*, which declares that in the case suggested the pledge "becomes a deposit." But in the subsequent or later editions of that work, the words, "and becomes a deposit," are omitted. It may not be amiss to state, in this connection, that jurists have distinguished *care* or *neglect* by three different degrees, namely, *gross*, *ordinary* and *slight*; and the law on this head, which prevailed in the ancient Roman empire, and still prevails in most civilized countries, constituting, as it were, a part of the law of nations, is substantially as follows:

Gross neglect, *lata culpa*, or, as the Roman lawyers most accurately call it, *dolo proxima*, is, in practice, considered as equivalent to *dolus*, or *fraud* itself; and consists, according to the best interests, in the omission of that care which even inattentive and thoughtless men never fail to take of their own property. This it is which they justly hold a violation of good faith.

Ordinary neglect, *levis culpa*, is the want of that diligence which the generality of mankind use in their own concerns; that of *ordinary care*.

Slight neglect, *levissima culpa*, is the omission of that care which *very attentive and vigilant persons take of their own goods*; or, in other words, of *very exact diligence*.

In contracts *reciprocally* beneficial to *both* parties, as of those of sale, hiring, *pledging*, partnership, and the contract implied in joint-property, such care is exacted as *every prudent man commonly takes of his own goods*; and, by consequence, the vendee, the hirer, the *taker in pledge*, the partner and the co-proprietor, are answerable for *ordinary* neglect (*Jones on Bailm.*, 24, 26).

These principles were recognized in an early case before the English courts, which was an action on a bond to account for money which had come to the defendant's hands as agent. The defendant pleaded that he locked up the money in his master's warehouse, and it was stolen from thence (not saying without default on his part). And it was adjudged that it was a good bar to the action, and a sufficient accounting within the condition of the bond (*Vere v. Smith*, 1 *Ventr. R.*, 121). And a case is mentioned in Fitzharris's Abridgment, where goods were locked in a chest and left with the bailee and the owner kept the key, and the goods were stolen; the bailee was held to be discharged (*Fitzh. Abr.*, 8th ed., tit. *Det.* 59, and *Viner's Abr.*, tit. *Pawn*).

And in a more recent case, in the English Court of King's Bench, Lord Kenyon held that a bailee of goods kept for hire was not liable for a theft committed by his servants, though there were some prior suspicious circumstances impeaching their fidelity. His lordship said: "To support an action of this nature, positive negligence must be proved. It has appeared in evidence that the goods were lodged in a place of security, and where things of much greater value were kept. This is all that is incumbent on the defendant to do; and if such goods are stolen by the defendant's own servants, that is not a species of negligence of a description to support this action, inasmuch as he has taken as much care of them as of his own" (*Finucane v. Small*, 1 *Esp. N. P. R.*, 315).

The reason of this rule is stated by Lord Holt to be that "the law requires nothing extraordinary of the bailee, but only that he shall use ordinary care in storing of the goods." Therefore, in each case of this nature the inquiry really is, has the defendant used such ordinary care? And it is incumbent on the plaintiff, before he can recover, to support his declaration by proper proofs;

it may be added that the *onus probandi* as to negligence will be on him (*Vide Dean v. Keate*, 3 *Camp. N. P. Cases*, 4; *Cooper v. Barton*, *Ib.* 5; *Marsh v. Howe*, 8 *Dow. & Ry. R.*, 223; *Hart v. Packwood*, 3 *Taunt. R.*, 264).

but there are authorities upon the point in the American reports. The Supreme Court of Alabama has recently laid down the rule that if a pledge is stolen, the pledgee is not absolutely liable nor absolutely excusable. If the theft is occasioned by his negligence, he is responsible. If without any negligence, he is discharged, being bound for ordinary care and answerable for ordinary neglect (*Petty v. Ovenall*, 42 *Ala. R.*, 145).

The Supreme Judicial Court of Massachusetts has held that a depositary for hire or reward is answerable only for ordinary neglect. If he uses due care, and the property deposited is nevertheless stolen, he is excused (*Foster v. Essex Bank*, 17 *Mass. R.*, 109). And substantially the same doctrine was laid down in a case some time since decided by the Supreme Court of Indiana (*Wapp v. Grayson*, 2 *Blackf. R.*, 130).

The Supreme Court of Alabama, in a much earlier case than that of *Petty v. Overall*, held that warehousemen not chargeable with negligence are not answerable for goods intrusted to them in case of robbery, or where embezzled by their storekeeper or servant; but that the *onus* of showing negligence is on the owner (*Moran Mayor, etc., of Mobile*, 1 *Stew. R.*, 284). And precisely the same doctrine was laid down by the old Supreme Court of the State of New York. Sutherland, J., who gave the opinion of the court in the case, said: "It appears to be well settled that a warehouseman or depositary of goods for hire is responsible only for ordinary care, and is not liable for loss arising from accident unless he is not in default. * * * In *Finucane v. Small* (1 *N. P. R.* 315), it was held that if goods be bailed to be kept for hire, if the compensation be for house-room, and not a reward for care and diligence, the bailee is only bound to take the same care of the goods as of his own; and if they be stolen or embezzled by his agent, without gross negligence on his part, he is not liable; and the *onus* of showing negligence seems to be upon the plaintiff, unless there is a total default in delivering or accounting for the goods" (*Schmidt v. Blood*, 9 *Wend. R.*, 268, 271). And in a much later case, the same court held that one who receives goods for deposit into his store, though standing upon a wharf, the goods to

remain there for the purpose of being forwarded, subject to the bailor's order, is liable merely as a warehouseman, and that he is bound to exercise no more than ordinary care in preserving the goods. And it was further held that public storekeepers receiving and storing goods for hire are not liable to the same extent as common carriers, nor are they bound to take better care of the goods than a prudent man would ordinarily take of his own property. And it was declared that where goods so received are, of themselves, well secured, the mere circumstance of receiving goods of another sort into the same store, which invite thieves into the store, who set it on fire and consume the former goods, will not make the bailee liable, unless the receipt of the latter goods will probably produce such a consequence (*Platt v. Hibbard*, 7 Cow. R., 497; and *vide Foote v. Storrs*, 2 Barb. R., 326; *Harrington v. Snyder*, 3 *ib.*, 380). These are cases arising under another species of bailment than that of a pledge, but the same rule would seem to apply so far as the care and diligence of the bailee are concerned.

Upon this point Mr. Justice Story remarks: "By our law, a bailee is in many cases excusable where the loss is by theft; but never where that theft is occasioned by gross negligence. So long ago as the reign of Edward III (*Year Book*, 29, *Liber Assisarum*, 28), it was held that if a person bail his goods to keep, and they are stolen, the bailee is excused. The reasoning of the court in *Coggs v. Bernard* (2 *Ld. Raym.*, 909) shows that the court did not consider theft as *prima facie* presumptive of negligence. In short, our law considers theft, like any other loss, to depend, for its validity as a defense, upon the particular circumstances of the case, and to be governed by the general nature of the bailment, and the responsibility attached thereto. It raises no presumption either way from the mere fact of theft. It neither imputes the theft to the neglect of the party, nor, on the other hand, exempts him from responsibility from that fact alone. But it decides upon all the circumstances of the case, and thence arrives at the conclusion that there has or there has not been a due degree of care used" (*Story on Bailm.*, § 39). And in a note in another part of his work he says: "It may, perhaps, after all, admit of doubt whether, as a general rule, theft was deemed even in the civil law as necessarily *per se* importing negligence, or presumption of negligence. The text of the Digest relied on by Sir Wil-

liam Jones to establish it is that which makes a partner liable for a loss by theft of a flock of sheep left with him by his partner to depasture. * * * Now, in the case of a flock of sheep, it may be that there could scarcely be a loss by theft without some negligence, or even without gross negligence, where in other cases theft might be without any the slightest negligence. * * * There are many cases where theft may be committed, against which no reasonable diligence could guard the bailee. * * * Besides, in many cases, where the thing bailed is valued, the Roman law presumed that the party took upon himself extraordinary risks" (*Story on Bailm.*, § 334, note 2).

Lord Holt says, in the case heretofore referred to: "If the bailee puts the horse lent into his stable and he is stolen from thence, the bailee is not answerable; but if he leaves the stable doors open, and thieves steal the horse, he is chargeable, because the neglect gave the thieves occasion to steal the horse" (*Coggs v. Bernard*, 2 *Ld. Raym. R.*, 909, 912). These remarks of his lordship were made in respect to a gratuitous loan of the article stolen, but they are quite pertinent to the point in hand, and have been recognized as sound in cases of pledge (*Vide Clarke v. Earnshaw*, 1 *Gow's R.*, 30).

CHAPTER XLVIII.

DUTIES AND OBLIGATIONS OF THE PLEDGEE UPON THE TERMINATION OF THE PLEDGE — LIABILITY UPON REFUSAL OR NEGLECT TO RESTORE THE PLEDGE — PRINCIPLES GOVERNING THE QUESTION OF THE PAWNEE'S LIABILITY FOR THE LOSS OF THE PAWN.

It has been before remarked that the pledgee is bound to return the pledge and its increase, if any, after the debt or other duty has been discharged. If the pledge has been lost or destroyed through any of the various ways which will excuse the pledgee from restoring the pawn, this duty is extinguished. And the Roman law, which is followed by Pothier, required the pawnee, on the debt or duty being discharged for which the pawn was held, to make due proof of the accident or other matter which caused the loss, when that was claimed as a reason for failing to

make restitution of the pledge, and, further, that he was unable to prevent it.

Mr. Justice Story says that the common law does not differ from the Roman law in this respect, where a suit is brought for the restitution of the pawn after a due demand and refusal. In such a case, the demand and refusal would ordinarily be evidence of a tortious conversion of the pawn; and it would then be incumbent on the pawnee to give some evidence of a loss or casualty, or by superior force, independent of his own statement, unless, indeed, upon the demand and refusal, he should state the circumstances of the loss; and then the whole statement must be taken together, and submitted to the jury, who would, under all the circumstances, decide whether it was a satisfactory account or not. But, if a suit should be brought against the pawnee for a negligent loss of the pawn, then it would be incumbent upon the plaintiff to support the allegations of his declaration by proper proofs, and the *onus probandi*, in respect to negligence, would be thrown on him. In such an action for a negligent loss, brought against the bailee, it seems that his acts and remarks, cotemporaneous with the loss, are admissible evidence in his favor, to establish the nature of the loss. These positions of the learned author are fortified by reference to elementary writers and judicial authorities, both American and English, and they are doubtless correct (*Story on Bailm.*, § 339).

In an action against a bailee without hire, brought before the old Supreme Court of the State of New York, the court held that, in such a case, the bailee was liable for *gross neglect* only; but declared, nevertheless, that if, on *demand*, he *refuses* or *omits* to deliver the article received, he is answerable, unless he can show its loss without fault or negligence on his part. The article delivered in this case to the bailee was a sealed letter containing a \$100 bank bill; and it is possible that the rule was held a little more stringently against the bailee, or rather that *presumptions* were indulged in a little more freely, than though the subject of the bailment had been of a different nature. The rule, however, can be very correctly applied to the case of a pledge. The presumptions, on demand and refusal, or neglect, perhaps might be the same in both cases (*Beardslee v. Richardson*, 11 *Wend. R.*, 25).

In an action brought in the Supreme Court of Pennsylvania against a mandatory for loss of property bailed to him, it was held

at his concomitant acts and declarations, immediately before and after the loss, are admissible in evidence to disprove his negligence, but otherwise of his own testimony (*Tompkins v. Saltmarsh*, 14 *Serg. & Rawle's R.*, 275). If the party who pledged the goods was not the owner of them, the pawnee may defend himself by showing that he has delivered over the goods to the real owner, unless the pawnee has a special property, which he is entitled, under the circumstances, to assert against the owner. The general rule in such cases, subject, however, to some exceptions, is that of the Roman law: *Nemo plus juris ad alium transferre potest, quam ipse haberet*. The exceptions are founded upon the public policy of protecting *bona fide* purchasers, under peculiar circumstances. If the pawnee held the pledge, merely as a pledge, from the owner, the second pawnee may discharge himself from any obligation to the owner by delivering it up to his own pledgor any time before an offer to redeem by the owner.

The pawnee makes himself responsible for all losses and accidents, whenever he has done any act inconsistent with his duty, or has refused to perform his duty. If, therefore, the pawnor makes a tender of the whole of the debt for which the pawn is given, and the pawnee refuses to receive it, or to redeliver the pledge, the special property which he has in it is determined, and he is henceforth treated as a wrong-doer, and the pawn is at his sole risk. The same rule applies to all cases of a misuser or conversion of the pawn by the pawnee. The rule, however, must be understood with the same qualifications as in other cases, that the same loss or accident would not otherwise have inevitably happened; for if it would and must have happened at all events, even, perhaps, he might not be liable for the loss. These statements are taken from Mr. Justice Story's work on Bailments, but they were extracted largely by him from the work of Pothier, the eminent French jurist and author, interspersed with an occasional reference to an American or English case pertinent to the subject; and the clearness and general accuracy of the statements would seem to supersede the necessity of any attempt at improvement, and will justify their insertion here (*Story on Bailm.*, §§ 340, 341).

Connected with this question of negligence in respect to the pledge, Sir William Jones mentions a provision contained in the ancient laws of the Wisigoths, and in the capitularies of Charlemagne and Louis the Pious, by which a depositary of gold, silver

or valuable trinkets is made chargeable, if they are destroyed by fire, and his own goods perish not with them; a circumstance which some other legislators have considered as conclusive evidence of gross neglect or fraud. He also mentions a provision in the northern code which he had not seen in that of any other nation, namely, that if precious things were deposited and stolen, time was given to search for the thief; and if he could not be found within the time limited, a moiety of the value was to be paid by the depositary to the owner, *ut damnum ex medio uterque sustinent* (*Jones on Bailm.*, 118).

It has been held by the Court of King's Bench of England that pawnees are not liable for loss or damage by fire, without proof of negligence; and the same doctrine, doubtless, would be recognized in this country, where no statute exists establishing a contrary rule (*Peers v. Sampson*, 4 Dowl. & Ry. R., 636).

Some cases from the American Reports, bearing upon the liabilities of pledgees, may be referred to as giving light upon the subject. A late case before the Supreme Court of Connecticut exhibits the view which courts are apt to take upon these questions. A bank held certain stocks as collateral security for the plaintiff's indebtedness, with the right to sell them if the indebtedness was not paid within a reasonable time, but with no arrangement as to the time, place or manner of sale. Some months after, the bank, without previous notice to the plaintiff, made a conditional sale of the stocks, which was to take effect if the plaintiff did not, on that day, pay or satisfactorily secure his indebtedness, and gave notice, that unless his indebtedness was paid or satisfactorily secured on that day, the stocks would be sold. The plaintiff remonstrated, and asked to be allowed one day more for the purpose, and, in fact, the next day procured the means of paying the greater part of the debt, but the bank closed the sale on that day. The court held that the conduct of the bank was unreasonable and wrongful, and that it was liable to the plaintiff in damages (*Stevens v. Hurlbut Bank*, 31 Conn. R., 146).

The Supreme Court of Ohio has held in a recent case that, where a party receives a note as collateral security for an existing debt, without any special agreement, he is bound to use ordinary diligence in collecting it, and is responsible for any loss which may happen to the other party by reason of a want of such diligence. But where a debtor assigns to his creditor as collateral security a nego-

liable promissory note of a third party, before maturity, and by the terms of the assignment waives demand and notice of non-payment, such creditor, acting in good faith, is not bound to demand or insist upon payment of the security before its maturity, though he may show at the trial that payment would be made, if insisted on (*Roberts v. Thompson*, 14 *Ohio R. N. S.*, 1).

The Supreme Court of Alabama has lately held that, where a party who has transferred a note by indorsment as collateral security pays the original debt, the pledgee is bound to redeliver the note to the pledgor, upon demand; and if he refuse to do so, he is liable in an action of trover by the pledgee for the conversion of the same (*Overstreet v. Nunn's Executors*, 36 *Ala. R.*, 649).

While slavery was legalized as an institution in the southern States, the Supreme Court of Mississippi held that the hirer of a slave is not responsible for him if he runs away, unless by the fault or negligence of the hirer. And it was declared that what will constitute reasonable diligence and care must depend upon the circumstances of each case (*Perry v. Beardslee*, 10 *Miss. R.*, 568). The rule is the same, so far as this point is involved, in case of a pledge of similar property.

The Superior Court of the city of New York has decided that, upon tender of the amount due for which a pledge is held as security, the lien of the pledge is destroyed, and the pledgee is bound to return the same to the pledgor on demand (*Haskins v. Kelly*, 1 *Rob. R.*, 160). And in another case it was held by the same court that pledgees of stock to secure the payment of a promissory note, given on a loan of money, are liable for a wrongful conversion of such stock, if not redelivered on demand and tender, although they may be excused by a stipulation in such note from returning the identical certificate of stock delivered on such pledge, where they set up, as the only ground for their refusal to deliver, a lien for money due by a third person (*Hardy v. Peyton*, 1 *Rob. R.*, 261). The case, however, was taken to the Court of Appeals of the State, where the judgment seems to have been reversed, unless the plaintiff remitted \$911; if so, then the judgment was affirmed without costs of appeal. The case is not reported in the Court of Appeals, but it is presumed that the principle of the decision in the court below remains undisturbed (*Vide* 41 *N. Y. R.*, 619, *note*).

In the late Court of Chancery of the State of New York a case

was decided in which it appeared that D. pledged stock to J. for a loan, and G. gave his due bill as collateral. The stock was equal in value to the debt, when D. tendered the amount to J., who refused to receive it, but retained the stock, which became worthless. The court held that these facts discharged G. from his obligation to J.; and the rule was distinctly laid down that if the amount of the debt for which a pledge is made is duly tendered to the pledgee and refused by him, and it sinks in value in his hands, he must bear or respond for the loss (*Griswold v. Jackson*, 2 *Edw. Ch. R.*, 461).

The Supreme Court of California has recently decided that, where a debtor has paid a debt which was secured by a pledge, the pledgee must account for all income, profits and advantages derived by him from the bailment (*Hunsaker v. Sturgis*, 29 *Cal. R.*, 142). And the same court held that where a party, who has pawned articles under a contract to pay greater interest on the money borrowed than the law allows, tenders to the pawnbroker the principal and lawful interest thereon, he is entitled to the possession of his property, although the statute, establishing the rate of interest in such cases, only provides a penalty for, and does not prohibit, the charging of more than lawful interest (*Jackson v. Shawl*, 29 *Cal. R.*, 267). The Supreme Judicial Court of Massachusetts, not many years since, made a decision of more or less interest upon this point. It was decided that where stock is held as collateral security for the payment of a note, and the agreement to reconvey it, upon the payment of the note, recites that the loss on a certain house "is bound" by the transfer of the stock, and the holder of the note has foreclosed a mortgage on such house, the value of which is less than the amount of the mortgage and interest, he is not bound to return the stock until he has been paid for the loss on the mortgage, including interest, and without being charged with any rent which he did not receive. And it was further held to be immaterial that the maker of the note subsequently guaranteed the defendant in a new contract against loss on the house, and the parties at that time computed the amount thereof. And, still further, that the holder of the note in such case is not guilty of laches in not selling the house, when the maker authorized him to rent it until it was sold, when the sale was deferred by the latter's consent, and he never requested that a sale should be made (*Bartlett v. Johnson*, 9 *Allen's R.*, 530).

Upon the debt or obligation, to secure which a pledge is made, being paid or discharged, it is the duty of the pledgee to redeliver the same to the pledgor on a proper demand to do so; and care should be taken that the pledge be delivered to the proper person. The present Supreme Court of the State of New York has held, in a case where the principle would apply in a case of pledging, that in an action of trover against the bailee of a chattel it is no defense to show a delivery of the chattel to a person not authorized to receive it. It results, from the very nature of a bailee's contract, that if he fails to return the article to the rightful owner, but delivers it to another person not authorized to receive it, he is guilty of a conversion. And it was held, when the parties to a contract of bailment reside in the same city, that the property should be returned to the bailor, at his residence, unless there is some agreement to the contrary. The fact that, at the time of the bailment, the property was stored by the bailor with a third person, was held not to authorize the bailee to return the property to such third person after he had ceased to be the agent of the bailor. It was declared, however, that when property, bailed, remains in the possession of the bailee, trover cannot be maintained against him by the bailor until the article bailed has been demanded, and the bailee has neglected or refused to return it. But if the property has been delivered by the bailee to a third person, such delivery amounting to a conversion, it was held that proof of demand and refusal is not necessary.

This was the case of a loan of a chattel, to be returned on request; and the only difference, in this respect, between such a loan and an ordinary pledge is, that in the case of the loan the bailee might be bound to take the property to the bailor, while in the case of a pledge, the pledgee need only redeliver the chattel to the pledgor, on demand, at the place where he may have it in store (*May v. Fanning*, 9 Barb. R., 176). Where no place was agreed upon between the pledgor and pledgee, or bailor and bailee, as to the place where the property should be redelivered, the civil law provided that the bailee might restore the property to the place from which he took it. But this rule has not been adopted in this country; and in any event the pledgee is liable if he delivers the pledge to a person unauthorized to receive it, so that it is out of his power to deliver it to the proper person on demand.

A few years ago an interesting case was before the Court of Queen's Bench, of England, involving the question of the liability of the pledgee in respect to the property pledged. Goods pledged with a pawnbroker were lost through a burglary on his premises, caused by his negligence. The owner laid a complaint before justices, under 40 Geo. III, ch. 99, § 14, against the pawnbroker for refusing, without reasonable cause, to deliver up the goods upon tender of the proper amount. The justices made an order that the pawnbroker, not having shown reasonable cause to their satisfaction to the contrary, should deliver up the goods, or, in default, compensate the owner. The court held, on a case stated, that the order was bad; § 14, under which the order was made, in effect applying only to cases of willful refusal by a pawnbroker to deliver up goods actually in his possession; and that the justices should have made an order under § 24, which empowers them to award compensation to the owner, if, "in the course of any proceedings" under the act, they shall find that the goods were lost "through the default, neglect or willful misbehavior" of the pawnbroker (*Shackell v. West*, 2 *Ellis and E. R.*, 326). It will be observed that no question was made in this case as to the liability of the pawnbroker, upon the facts proved. The only question really made was one of practice under the English statute, which had nothing to do with the merits of the case, and is, therefore, not important here.

The question of negligence may depend on the nature of the thing bailed. In an early case in England, where the owner of a cartoon, painted on paper and pasted on canvas, deposited it with a gratuitous bailee, who kept it in a room next a stable, in which there was a well that had made it damp and foul, it was left to the jury whether this was gross neglect. They found this question for the plaintiff, with thirty pounds damages, and the court refused a new trial, because on a bare leaving a thing in another's custody the law raises a promise not grossly to neglect or abuse it (*Mytton v. Cock*, *Strange's R.*, 1099).

In another more recent case in England, where the plaintiff had given £32 10s. to the defendant, a coffee-house keeper, in whose house he was staying, to keep safely for him without reward, and the money was stolen, together with a larger sum of the defendant's own money, the judge left it to the jury to say whether the defendant was guilty of gross negligence, and he told them that the loss

the defendant's own money did not necessarily prove reasonable. The jury found for the plaintiff, and the direction of the judge was upheld (*Doorman v. Jenkins*, 2 *Adolph. & El. R.*, 256). These last two mentioned cases were those in which the defendants were *gratuitous* bailees; but they shed light upon cases where the bailment is beneficial to both parties, as cases between pledgor and pledgee. In the last case, it was held no answer to the action at the defendant had exposed his own goods to the same peril as the plaintiff's, and, of course, it could not be expected that under similar circumstances the same plea would protect a remunerated bailee or pledgee.

The evidence of negligence in the case of *Shackell v. West* (2 *Lis & E. R.*, 326), was that the pawnbroker had left his house, without any person in it, on the night of the burglary; and Cockburn, C. J., said that it was a stronger case to impute culpable neglect on the part of the pawnee than the case of *Healing v. Cottrell*, to which he referred, where the question was whether leaving valuable goods in the appellant's house during the night, without any person on the premises, was a careful dealing with the goods. In the case of the pawnbroker, in which case the judgment was against the appellant.

A bailee dealing negligently with goods entrusted to him does not thereby necessarily lose his character of bailee, so as to be liable as for a conversion. To make such a conversion, there must be some abdication by the defendant of the owner's right or some exercise of dominion over them by him inconsistent with such right. Upon this principle, the removal of goods *in transitu* by a shipping agent to a warehouse for his own convenience was held by the English Court of Common Bench not to be an excess or breach of duty which should render him liable in trover for the loss of the goods by an accidental fire (*Heald v. Carey*, 11 *Com. Bench*, 977; *S. C.*, 16 *Jur.*, 197; 21 *S. J.*, *N. S. C. P.*, 97).

But the bailee is always held to be liable where he has determined the bailment by an active wrong, as by selling the goods bailed, by misusing them, by treating them in a manner inconsistent with the bailment; and, *a fortiori*, by destroying them, for the bail is thereby determined and the possessory title reverts to the bailor, so that the right of possession is sufficient, without having actual possession; and where the bailment is determined in any manner, trover will lie at the suit either of the pawnor or of a

purchaser from him against the pawnee. These are points which are well settled, especially by adjudications in the English courts (*Vide Cooper v. Willmatt*, 1 *Com. Bench R.*, 672; *Finn v. Bittleston*, 7 *Ex. R.*, 152; *Franklin v. Neate*, 13 *Mees. & Welsb. R.*, 481, 485; *Selwyn's Nisi Prius*, 12th ed., 1340, 1341).

So, also, the law is well settled that if, on demand, the money or other thing necessary for the redemption of the pawn be *tendered* to the pawnee and he refuses to give it up, such demand, tender and refusal would ordinarily be evidence of a tortious conversion of the pawn, which is considered as being instantly reduced into the possession of the pawnor, who may therefore in such a case maintain trover for it. And it would be for the pawnee to give evidence of a loss by casualty or otherwise. These points have been decided in cases already referred to, and others may be cited to the same import (*Vide Ratcliffe v. Davis*, *Cro. Jac.*, 244; *S. C.*, *Yelv. R.*, 178; *Isaac v. Clark*, 2 *Buls. R.*, 306). But when the action is for loss or damage, it has been before shown that the *onus* will be on the pawnor to show negligence on the part of the pawnee; and the question of negligence is always for the jury, provided there is any proper or sufficient evidence on the subject (*Doorman v. Jenkins*, 2 *Adolph. & El. R.*, 256).

But the matter of the pledgor's remedy against the pledgee in respect to the pledge will be more appropriately considered in a subsequent chapter.

The editor of the Pawnbrokers' Gazette of London has furnished some opinions given by eminent counsel on the pawnee's liability for loss of or injury to the pawn, under particular circumstances, which are inserted by Mr. Turner in a note in his little work on the Contract of Pawn; the substance of which may be taken to conclude this chapter.

The late Common-Sergeant, Newman Knowlys, in 1819, was asked his opinion in a case where a coat, which had been twenty months in pawn, was found, upon its redemption, to have been seriously injured by moth. The magistrate at Shadwell Police Court thought that the pawnbroker was liable, but consented to suspend his decision until the learned common-sergeant had been consulted.

Mr. Knowlys said: "I am of opinion the pawnor must fail on the facts here stated. This case must be decided upon the ground of the right of the parties to recover. Supposing an action at

had been brought, and the same proof given by competent witnesses, the great case of *Coggs v. Bernard* (in 2 Lord Ray-
mond, 916), which is universally acted upon, decides the case in
favour of the pawnbroker. Lord Holt, in delivering his judgment
in that case, mentions the different cases of bailment, and applies
the law distinctly to each; and in speaking of the fourth sort of
bailment, viz., *Vadium* or *pawn*, he considers in the second place
what neglects the pawnee shall answer, and he says in that case
the law requires nothing extraordinary of the pawnee, only that
he shall use *an ordinary care* for restoring the goods. The
pawnee is not like the common carrier, an insurer at all events,
except for the act of God and the king's enemies; if the pawnee
uses the same care respecting the goods pawned as men generally
use respecting their own property, he is not answerable for any
damage or deterioration that the goods may undergo whilst under
his care. If he has suffered his warehouse to be out of repair,
and the goods have received damage by weather, that would be a
fault, and he must answer for it; or, if he leaves his doors and
windows open all night, and the goods are stolen, he must answer.
But in this case the pledge has received damage from moth in the
course of twenty months' keeping, and I conceive that cannot be
held to be a default. I happen to know by experience in my own
family, and in those of several of my friends, that after the utmost
care and attention toward that particular mischief, silks, furs and
colours have suffered considerable deterioration in less than a
quarter of the time here specified. The pawnee is not an insurer
against all possible loss or deterioration, as is clearly established
in the case cited. The words of the statute 39 and 40 Geo. III,
§ 99, do not express any such obligation, and, when construed
on legal principles applicable to the cases of pledge, do not, in
my opinion, render the pawnbroker liable in any case circum-
stanced like the present."

The case was sent back to Mr. Common-Sergeant for reconsid-
eration, but he adhered to the view before given, saying: "I take
that on the principle of the pawnee's having a qualified prop-
erty in the goods, it is, that if he takes the same care of them as
a man would take of his own goods, he is not only excused in a
partial loss, but can, even after a total loss, still maintain his action
against the pawnor for the money advanced even upon lost goods.
The terms *default and neglect*, used in the act of parliament, must

be construed *secundum subjectum materum*, as the law then bore upon it, and must be confined to such damage or loss by default or neglect as would have sustained an action against the pawnee by the pawnor at common law. Such action, upon the authority of *Coggs v. Bernard*, could only be sustained upon proof of *crassa negligentia*, and would be defeated if it appeared that the pawnee had used the common and ordinary care that a man would use with his own concerns. So much for the law. If it shall be held that the pawnee, in all cases of woollen or silk or linen goods being deposited with him, is to be at the trouble and expense of having them all daily or weekly unfolded and brushed, or otherwise dealt with, for fear the moth should either have deposited its eggs in it at the time they were brought in, or during their abiding in pawn, I apprehend it might very probably induce the pawnbroker to decline the taking in of goods of that description, and so the means of raising an occasional supply of money (so indispensable to the poor), would to that extent be cut off, which in my opinion is an argument in point of policy, in addition to what has been urged upon legal principles, in support of the opinion I have conceived on the subject. In the case of a large stock of woollen garments the pawnbroker would actually be obliged to become a scourer by trade as well as pawnbroker. If the defendant in the present case has kept his woollen clothes as fairly as the rest of the trade have done theirs, I cannot but conceive that he has done all that the law requires."

On the same principle, Lord Campbell, when attorney-general, advised that where a pawnbroker, in answer to a summons for compensation, showed a loss by robbery, the plaintiff could not recover: "I am of opinion that the magistrates have no power under the act 39 and 40 Geo. III, ch. 99, to compel the pawnbroker to make satisfaction to the pawnors of goods lost under the circumstances stated. The action only applies where the pawnbroker does not show any *reasonable* cause for not returning the goods, and a reasonable cause is shown by the goods having been stolen" [without negligence on the part of the pawnee].

In a similar case, heard at Worship street in 1818, at the suggestion of the sitting magistrate the late Mr. Adolphus was asked for his opinion on this question of liability. The learned gentleman said: "I have bestowed much attention on this case, and have well considered all the authorities on the subject, not so much

because I felt any great difficulty about it on the first perusal, as out of respect to the worthy magistrate who does me the honor to believe that my opinion can assist in removing any doubt which exists in his mind.

“Viewing the pawnbroker, first, in the light of a bailee at common law, I am clearly of opinion that, under all the circumstances above stated, he is not answerable to the pawnor for the goods which have been stolen by robbers. It is too loosely stated in some books that if a man pledge goods and they are stolen, the bailee shall not answer for them, or that the bailee shall not, in such case, answer for them, if he took as much care of them as he did of his own goods. A man who takes in pawn for profit, has a higher duty thrown upon him. The pawnee is answerable for all defects of care, diligence or negligence by which the property is lost; and, *therefore*, if it was conveyed away by sleight, embezzled by a servant, or snatched from his hand, his counter or his window by a thief who came in suddenly, he would be answerable for it. But if it was taken from his person by robbery, or from his house by burglary, he would not be answerable; and in the present case he is not answerable. Robbery or burglary can be no more prevented by him or by care taken, than those accidents by tempest, flood or fire, which are called the acts of God, or those invasions of the enemy, or tumultuous risings of the people, which can only be restrained or impeded by the public, and not by individual force or foresight. This distinction, which governs this case, is recognized by all writers. Indeed, there is hardly a difference among them. (See Bacon’s Abridgm., Gwillim’s ed., Bailm. B., and notes; the learned and ample opinion of Holt, C. J., in the case of *Coggs v. Bernard* [2 Lord Raym., 909], particularly at page 917, with the marginal notes and references by Mr. [afterwards Judge] Bayley. See, also, Jones on Bailments, p. 44, n., for the difference between private and forcible stealing, with the authorities; also the same work, p. 75, for the general law on the subject.) If the law has varied in more recent times, it has rather been relaxed than strengthened against the bailee; for where a man undertook, for hire, to keep the goods of another, and they were stolen by the bailee’s own servant, Lord Kenyon held that an action against him could not be maintained, even where it was proved that he had been told that his servant was dishonest (*Finucane v. Small*, 1 Esp., 315).

“I come now to consider how the pawnbroker is affected by the

statute 39 and 40 Geo. III, ch. 99. In respect of his duty as bailee, I think it makes no alteration ; it only gives summary remedies in certain cases. The fourteenth section is made to govern cases where the pawnbroker, having possession of the pledge, or having parted with it within twelve months or fifteen months, under certain circumstances, neglects or refuses to deliver it up to the pawnor, and for such neglect or refusal does not show reasonable cause to the satisfaction of a justice ; I say that the fourteenth clause governs those cases, because the twenty-fourth clause provides a remedy where pawns are embezzled or lost, or damaged through the default, neglect or willful misbehavior of the pawnbroker."

Although the statute of 39 and 40 Geo. III, ch. 99, is referred to in these opinions, it will be observed that that statute has reference only to the *proceedings* to enforce the liability of the pledgee, and does not, in the least, affect the question of the pledgee's liability itself. It is obvious, therefore, that these opinions of the eminent English lawyers are just as suggestive in their application to the subject here as in Great Britain. These opinions are not *authority*, of course, because not *judicially* declared, and yet they are entitled to very great respect, on account of the conceded ability and distinction of the gentlemen who gave them. The law has, doubtless, been correctly expounded by these learned counsel, in *the main* ; but their opinions are, nevertheless, open to criticism in two or three of the positions taken.

In respect to the case of damage by moths, it would probably be requiring too much of the pawnee, as Mr. Knowlys suggests, that he should "be at the trouble and expense of having all pawns of goods, liable to be destroyed by moths, daily or weekly unfolded and brushed." Still the pawnee should be bound, in such a case, to resort to some of the known means, such as using camphor or other drug which kills these troublesome insects, or, as most people know by experience, there would not be much left of any woolen garment or article of fur at the end of twelve months. It seems less than ordinary care to store goods of this nature, without taking any such precaution ; and it is, at least, as unreasonable for the pawnee so to store the goods, as it would be for the pawnor to require the pawnee to keep a staff of persons incessantly employed in unfolding and brushing them. The only defect in Mr. Knowlys' view, therefore, would seem to be that, in the particular case before him, he does not require quite enough of the pawnee

And Mr. Adolphus certainly errs in the opposite direction when he says: "A man who takes in pawn for profit has a higher duty thrown upon him. The pawnee is answerable for all defects of care, diligence or negligence by which the property is lost; and, *therefore*, if it was conveyed away by sleight, embezzled by a servant, or snatched from his hand, his counter or his window by a thief who came in suddenly, he would be answerable for it; but if it were taken from his person by robbery or from his house by burglary, he would not be answerable; and in the present case he is not answerable, for the cases there put are cases in which no negligence can be imputed to the pawnee, and in which, *therefore*, he ought not to suffer." The mistake in this view of Mr. Adolphus is in assuming that the *fact* of the loss of the property in any of the ways supposed is conclusive upon the question of liability of the pawnee. The rule is that in all such cases the question still is one of negligence, to be settled by the circumstances of the particular case. The difficulty is not so much in stating the rule as in applying it. It is very easy to say that the pawnee is liable for gross negligence, but it is not at all easy to draw the line at which gross negligence begins. The solution of this nice and delicate problem is very properly left to the decision of the jury, who, as men of the world, and with a knowledge of business, are peculiarly fitted to express an opinion. If they find that the pledge has been lost in the case before them through the *fault of the pledgor*, he will be held responsible for it, however the loss occurred; but if, on the contrary, they find that the loss was not from a want of proper and reasonable care and diligence on the part of the pledgor, he will be excused. The pledgor must in all cases abide the loss, where it occurred from any cause which a careful and vigilant man could not have avoided.

In addition to what has already been said, it may be added that the Superior Court of the city of New York has very recently decided that if, to a demand for the return of loaned property, the pawnee answers that he has used the property, and has obtained a loan thereon (the property not having been lent for that purpose), this is sufficient evidence of a conversion. And it was held in the same case that the measure of damages in an action for the conversion of property is its highest market value between the date of the conversion and the trial (*Nauman v. Caldwell, 2 Sweeny's R., 212*).

CHAPTER XLIX.

REMEDIES OF THE PLEDGOR IN RESPECT TO THE PLEDGE—WHEN HE MAY BRING HIS ACTION OF TROVER OR REPLEVIN—HIS ACTION IN EQUITY TO REDEEM—HIS ACTION WHEN THE PLEDGE IS WITHOUT LEGAL CONSIDERATION.

THE rights, remedies, duties and obligations of the pledgee, in respect to the pledge, and the debt or obligation for which the debt was made, have been fully considered, and the *rights* of the pledgor in respect to the property pledged, have been heretofore discussed. But it is necessary to dwell more *directly* upon the subject of the *remedies* of the pledgor after the termination of the contract of pledge.

Where the thing pledged is an ordinary chattel, such as a watch, a carriage, a horse, or the like, and the contract has been terminated by the payment or tender of the debt or obligation which the pledge was made to secure, or in any other way than by the sale of the pledge, the pledgor has a remedy at law, on demand of the pledge, by an action of trover or replevin. And it has been held that the pawnor may sue a pawnee, through whose negligence the pawn has been injured or lost, in *assumpsit*, for breach of contract, for, in all cases of bailment, the promise is implied by law that the bailee was to use reasonable care (*Ross v. Hill*, 2 *Eng. Com. Bench R.*, 877).

So where the bailment has been determined by any active wrong of the bailee or pledgee, as by selling the goods pledged, by misusing them, or by treating them in any manner inconsistent with the bailment, trover will lie, at the suit either of the pledgor or of a purchaser from him, against the pawnee, for a wrongful conversion (*Franklin v. Neate*, 13 *Mees. & Welsb. R.*, 481, 485). And the same would be the rule where the money or other thing necessary for the redemption of the pawn has been *tendered* to the pawnee. On the pledge in such case being demanded by the pledgor of the pledgee, and the latter's refusal to give it up, the pledgor may maintain trover against the pledgee for the value of the same (*Ratcliffe v. Davis*, *Cro. Jac.*, 244).

It was, at a very early day, held by the courts of England that the remedy of the pledgor against the pledgee was in accordance with this statement; and it was decided that if a bailee of jewels

for safer custody pawn them to another, the owner may maintain trover against the pawnee (*Hartop v. Hoare*, 2 *Str. R.*, 1187).

If the goods are injured by a stranger or taken by him from the pawnor, the pawnee may sue for damage to his reversionary interests and the bailee to his possessory rights. And it has been held by the Court of Common Pleas of England that the pawnor may maintain trover against a purchaser of his goods from the pawnee, even though the purchase was *bona fide* (*Cooper v. Willematt*, 1 *Com. bench R.*, 672). But this, of course, must be qualified to the effect that the sale of the pledged goods by the pledgee was void, so irregular and unjustifiable that no title could pass.

In respect to the damages recoverable in these cases, when the action is in trover, the general rule is that the value of the property converted is the measure of damages. But this rule is subject to many exceptions. If the defendant be clearly a wrongdoer, *omnia præsumuntur contra spoliatorem* applies; as where the defendant detained a jewel, the jury were told to presume the longest against him, and make the value of the best jewels the measure of their damages (*Armory v. Delamiric*, 1 *St. R.*, 505). And special damages may be recovered for the detention of the property over and above its value, as in trover, by a carpenter for his tools; whereby, it was alleged, he was prevented from working his trade (*Bodby v. Reynolds*, 8 *Queen's Bench R.*, 779).

When the goods have fluctuated in value, it seems very much at the discretion of the jury to say at what point of time the value shall be taken, whether at the time of taking, or at the day when the value was highest or lowest; although, in a case heretofore referred to, the Superior Court of the city of New York held, as a matter of law, that when the loanee of property pledged the property to secure a loan, the owner might bring his action for the conversion of the property, and that the measure of damages in the action was the highest market value between the date of the conversion and the trial of the action (*Nauman v. Caldwell*, 2 *Greeney's R.*, 212).

If the taking of the property was not only wrongful, but *willful*, then the measure of damages in the action for the conversion is the value of the articles at the highest estimate between the date of conversion and the trial. But it seems to be understood that this should never be the rule when the party has acted *bona fide* (*Sedgwick on Damages*, 478, 495).

It has been heretofore stated that, in cases of pledge, if the pledgee tortiously sell or deal with the pledge, the pledgor's right of recovery is clear; but that the pledgee has a right to have the amount of his debt recouped in the damages (*Story on Bailm.*, § 315). And a case quite recently came before the English Court of Common Pleas, where A. deposited a dock warrant for certain goods with B., as security for a loan, to be repaid on a certain day, with liberty to B. to sell the pledge on default. A. became bankrupt, and B., before the day of payment, entered into an absolute contract for the sale of the goods; he handed the dock warrant to the dock company on the day of payment, and the vendor took actual possession of the goods the day after. The court held that this was a wrongful conversion of the goods by B., but (*dissentiente*, Williams, J.) that the measure of damages was not the full value of the goods, but the damage which A. had actually incurred by the premature sale, which, in this case, was merely nominal (*Johnson v. Stear*, 33 L. J., N. S. C. P., 130).

In detinue the damages are, in general, merely nominal, but the jury find the value of the articles detained; and the common-law judgment is, that the plaintiff recover the articles or their value, together with the damages and costs found by the verdict, and the costs of insurance (*Phillips v. Jones*, 15 *Queen's Bench R.*, 859). And special damages may be recoverable for the detention, if laid in the declaration (*Williams v. Archer*, 5 *Com. Bench R.*, 318). But it seems that if no special damages be alleged, or only colorably so, the defendant may, in general, obtain an order for a stay of the proceedings on delivering up the goods or deeds in question, and paying nominal damages and costs; or if the plaintiff insists on proceeding for damages, the order will be for the delivering up of the deeds or goods, and that the plaintiff shall be subject to the costs of the action, unless he recover damages beyond nominal damages for the detention of the goods (*Williams v. Archer*, *supra*); but not, in general, where the goods have been sold, and it is uncertain whether they were sold for the real value or not (*Gibson v. Humphrey*, 2 *Dowl. R.*, 68). At least, it has been held in accordance with these statements in England, and a similar practice is recognized in this country.

An action for the recovery of chattels detained is an action to try a right, beside the mere right to recover damages, and, therefore, has been held not to be within the English common-law pro-

act of 1860, which enables a judge, in any action for an alleged wrong, to certify to the contrary, in order to deprive the plaintiff of his costs upon recovery of less than £5 (23, 24 *Vict. op.*, 126, § 34; *Danby v. Lamb*, 31 *L. J., N. S. C. P.*, 17).

It has been held by the English courts that in trespass for disaining goods (as pawns), which are not distrainable, the tenant in only recover for the actual injury he has sustained (*Harvey v. Cock*, 11 *Mees. and Welsb. R.*, 740). If the seller of the goods take them from the buyer before they have been paid for, it is held that the buyer may, nevertheless, recover the entire value as damages in trespass, and the jury can allow any deduction on account of the debt the buyer owes the seller for the price unpaid (*Fillard v. Brittan*, 8 *Mees. and Welsb. R.*, 575). And it is held that, in an action of debt, the plaintiff is to recover the sum *in numero*, and not a compensation in damages, as in those actions which sound in damages only, as *assumpsit*. The damages given for the detention of the debt are merely nominal (*Selwyn's Nisiarius*, 570).

In trespass, where no circumstances of aggravation are shown, the action is to be regarded as one of trover, and the value of the property, with interest, furnishes the measure of damages (*Sedgwick on Damages*, 530). But Alderson, baron, in one case, observed that it was entirely a question for the jury what damages they would allow. "Juries have not much compassion for trespassers; and I do not think they were bound to weigh in golden scales how much injury a party has sustained by trespass" (*Lockley Pye*, 8 *Mees. and Welsb. R.*, 135).

In debt or in *assumpsit* between the parties to this contract, justice is immaterial, and indeed is held to be irrelevant to the issue raised; and the damages should be limited to the pecuniary loss resulting from the breach of contract (*Broom's Commentaries*, 1st ed., 613, and *vide Fletcher v. Tayleur*, 17 *Eng. Com. Bench.*, 21, 29, *per Willes, J.*).

The foregoing authorities are mostly from the English Reports, but the doctrine of those cases is similar to the decisions of the American courts upon the subject. The Supreme Court of Indiana, somewhat recently, held, where it appeared that the pledgee of a negotiable promissory note settled with the maker for less than its face, that the pledgor may sue the pledgee for the value of

the pledge without a previous demand (*Depuy v. Clark*, 12 *Ind. R.*, 427).

It was held at a very early day, by the courts of New York, that where the pawnee has incapacitated himself from performing the contract on his part, as by selling the pledge, the pawnor need not tender the sum borrowed, in order to entitle himself to an action. So held by Kent, C. J., in a case before him, but which was settled by the parties before judgment, although his opinion, to this effect, was prepared and reported (*Cortelyou v. Lansing*, 2 *Caines' Cases*, 200). And the Supreme Court of Indiana held, also at an early day, that on payment of the debt for which a note was pledged the absolute property therein vests in the pawnor; and if the pawnee afterward converts it to his own use, the pawnor may maintain an action of trover for the note (*Elliot v. Armstrong*, 2 *Blackf. R.*, 198).

A case came before the Supreme Judicial Court of Massachusetts, in which it appeared that the certificates of the stock of a company were, by a vote of the company, made transferable by indorsing on them the name of him to whom they issued; and one of the company, who held such certificates, indorsed and pledged them as collateral security for a debt, which was afterward paid from his funds by his agent, who received the certificates, and afterward pledged them so indorsed as security for his own debt. The court held that the last pawnee, who knew not the pawnor's defect of title, might hold them, as against the original owner, till the debt for which they were pledged to him should be paid. And on tendering the amount of that debt the original owner of the certificates was held entitled to recover the value of the stock, deducting the amount of the debt which had been tendered, though an action was pending against the pawnee by an agent of the pawnor, who claimed the certificates under a supposed lien of the principal thereon, arising from a debt of the original owner incurred before the pledge was made to the defendant. Two of the judges dissented, but the judgment of the majority of the court was in accordance with this statement (*Jarvis v. Rogers*, 13 *Mass. R.*, 105; *S. C.*, 15 *ib.*, 389).

Although the pledgor has in all cases the right to redeem the pledge, still, if the pledge is sold, and there is a surplus over and above the debt of the pledgee, this surplus belongs to the pawnor, and he may bring his action of assumpsit against the pawnee to

cover the same. Where the pawnee exercises this liberty of selling the pledge to pay himself, and there remains a surplus, he comes the trustee of the pawnor in respect to it; and the latter may at all times waive his right to redeem the pledge, if he is to receive the surplus (*Stevens v. Bell*, 6 *Mass. R.*, 343). On the redemption of the pledge by the pledgor, the pledgee is bound to return the pledge to the pledgor, and account to him for the rents and profits, if any, of the thing pledged; and the pledgor may recover the same by the proper action against the pledgee. So held by the Supreme Court of North Carolina many years ago, and the doctrine is in accordance with law (*Horton v. Holliday*, *Murph. R.*, 111). The Supreme Court of New Hampshire held, several years ago, that where notes have been pledged to secure a claim upon which judgment has been recovered, interest could be cast, on the notes so pledged, to the time of their payment; also upon the judgment to the same time. And that in an action brought by the pledgor to recover back the surplus, the plaintiff is entitled to interest upon the excess of the proceeds of the notes over the amount received for the judgment up to the rendition of his judgment. Notes which had been pledged to secure a claim upon which, afterward, judgment was recovered, as they became due were paid to the pledgee. The court held that the money so received would be treated as having been applied in satisfaction of the judgment, and would not be regarded as a fund to be recovered back by the pledgor, subject to be reduced by the judgment as a set-off (*King v. Hutchins*, 8 *Foster's R.*, 561).

The Supreme Court of California, not long since, held that a party by pledging negotiable securities, transferable by delivery, reserves all right to the securities when transferred by the pledgee in good faith to a third party, and the pledgee in such a case could be treated in the transaction as the agent of the owner, and the owner should be bound by his acts in the premises. But, of course, the pledgor can bring his action against the pledgee to compel him to account for the disposition of the securities by him (*Wright v. Humbert*, 5 *Cal. R.*, 260).

Besides the legal remedies of the pledgor referred to, the pledgor may, if he please, go into a court of equity for relief. And if a time for redemption of the pledge is fixed by the contract, still the pledgor may redeem it afterward if he applies to a court of equity within a reasonable time. If no time is specified for payment, the

pledgor may redeem it at any time during his life, unless he is called upon to redeem by the pledgee; and if he fails in so redeeming it, his representatives may redeem it. But the remedy is at law, unless some special ground is shown, as if an account or discovery is wanted, or there has been an assignment of the pledge (*Story's Eq. Jur.*, § 1032; 2 *Spence's Eq. Jur.*, §§ 637, 772, 773; *Kemp v. Westbrook*, 1 *Ves. R.*, 278; *Hirst v. Peirse*, 4 *Price's R.*, 339; *Demandray v. Metcalf*, *Prac. Ch.*, 419, 420; *Glennie v. Irwin*, 3 *You. & Coll. R.*, 436; *Jones v. Smith*, 2 *Ves. Jr.'s R.*, 372).

There are several American cases holding, in general terms, that a bill in equity may be filed by the pledgor to redeem goods pledged for the payment of a debt, notwithstanding that there is a remedy at law on payment or tender of the sum due (*Herst v. Ten Eyck*, 2 *Johns. Ch. R.*, 62; *Chapman v. Turner*, 1 *Call's R.*, 280; *Flowers v. Sproule*, 2 *Marsh. R.*, 56). But the courts of North Carolina have held that the remedy of the pledgor to redeem his pledge is, in general, at law, on tender of payment and not by bill (*Doak v. Bank of the State*, 6 *Iredell's R.*, 309).

The Superior Court of the city of New York has held that although the pledgor cannot, in every case, come into equity to redeem the pledged goods, yet, where any special ground is shown, as if an account of dividends received by the pledgee is wanted, or there has been an assignment of the pledge, a bill in equity will lie (*Hasbrouck v. Vandervoort*, 4 *Sandf. R.*, 74).

The Supreme Court of Nevada has recently decided that where goods are pawned as security for a running account, it is not essential that the pawnor should tender the amount of the account before filing a bill in equity to redeem. If the pawnor proffers to account with the pawnee, and pay whatever is found due on such accounting, and that proffer is refused, the court held that the pawnor may bring his complaint for accounting and redemption at the same time; and if the pawnee has sold the goods, he may have a decree for the balance due him from the proceeds of the sale. In the case before the court it appeared that county warrants were pledged to a merchant as security for a running account, and there was an agreement that the merchant might, at any time, sell the warrants at fifty cents on the dollar, or take them himself at that price. The court held that the pawnee would not be allowed to hold the warrants at that price, unless he should clearly show, either that he notified the pawnor of his intention to take them at

the rate of fifty cents, or actually gave him credit at that price on his books (*Beatty v. Sylvester*, 3 Nev. R., 228).

In an action before the present Supreme Court of the State of New York, at a Special Term, it appeared that on a loan of money the borrower pledged *certificates of stock* to the lender as security, the *full par value* of which was equal to the amount of money loaned, and the stock, thereupon, was transferred to the pledgee on the books of the company; and it was agreed that, in default of payment of the half-yearly interest by the pledgor, or of the principal sum loaned, as in the agreement specified, the stock was to become *absolutely and exclusively the property of the pledgee*, and nothing had been paid on account of either principal or interest for a number of years, and both pledgor and pledgee had treated the stock as *forfeited*, under the agreement, to the pledgee, who then held it but had never taken any proceedings to foreclose the pledge, the court held, in an action by a *judgment creditor of the pledgor*, brought more than four years after the pledge, that so long as the stock remained with the pledgee the debt existed and the pledge was collateral to it, and the stock liable to be redeemed by the pledgor; that to this *equity of redemption* the plaintiff was entitled, as the creditor of the pledgor, having exhausted his remedy at law; and that the rights and equities of the pledgee were precisely those of the plaintiff (*Stoker v. Cogswell*, 25 How. Pr. R., 267).

The English Courts held, at a very early day, that where the pawn has a special and peculiar value to the owner, specific delivery of it will be decreed at the suit of the pawnor, on the same principle as was recognized in the case of the Pusey horn (*Pusey v. Pusey*, 1 Vern. R., 273). And it was held that a bill lies to compel the delivery of an altar-piece (*Duke of Somerset v. Cookson*, 3 P. Wms. R., 389). And, indeed, where there is no peculiar value to the pledge, a delivery of the same would probably be ordered between pawnor and pawnee, on the ground of fiduciary relation. This doctrine has been recognized by several English cases; one where furniture was deposited in trust (*Wood v. Rowcliffe*, 3 Hare's R., 304); and another, where an agent had deposited mortgage deeds (*Jackson v. Butler*, 2 Atk. R., 306). And the Supreme Court of Wisconsin has decided, in general terms, that the pledgor of securities, having paid the debt secured by them in equity, may compel a specific delivery of them to himself (*Brown v. Runals*, 14 Wis. R., 693).

The Supreme Court of Pennsylvania has decided, where a party assigned certain shares of bank stock as collateral security for the payment of a promissory note, with authority to sell in case of non-payment, that the assignor's equity of redemption was barred at the end of six years from the maturity of the note, the stock being then of less value than the debt, and the assignee having treated it as his own, instead of selling. And it was held that a court of equity will not grant relief in such a case after a lapse of eleven years, the stock having risen in value after the assignee's right on his note was barred by the statute of limitations (*Waterman v. Brown*, 31 Penn. R., 161). And the Supreme Court of the State of New York has held that, where stock is pledged as security for a note, the pledgor's equitable action to redeem commences when the note became due; and if it is not brought within ten years from that time it will be barred by the statute. It was declared that such a case comes within the section of the Revised Statutes relative to bills for relief in cases of trusts not cognizable by the courts of law. And it was held that the court would not, to relieve a pledgor from the statute, assume, in the absence of any allegation or proof on the subject, that there was an agreement between the parties that the pledgee should keep the stock until he should have repaid himself out of the dividends and proceeds. It seems from the decision of the court that the legal remedy of a pledgor, by trover, is limited by the New York statute of limitations to six years after the maturity of the note, for the payment of which the property is pledged (*Roberts v. Sykes*, 30 Barb. R., 173).

It has been before stated that, where there is no contract on the part of the pledgee requiring him to sell the pledge, he cannot be compelled at common law to do so, and this is the general understanding of the law; and yet a court of equity might interfere in favor of the pledgor and compel a sale where there are circumstances which seem to make it proper, provided it is reasonably clear that the property would produce more than sufficient to satisfy the debt, or the property is of a perishable nature (*Vide Kemp v. Westbrook*, 1 Ves. R., 275; 2 Story's Eq. Jur., §§ 1031, 1032, 1033).

Upon the subject of the right of the pledgor to come into a court of equity to redeem the pledge, the Superior Court of the city of New York, in a much later case than that of *Hasbrouck v. Vander*

court, before referred to, declared that a court of equity has no general jurisdiction over actions to redeem personal property pawned, without some other circumstances rendering its interference necessary. The remedy at law is held to be ample, by tender of the amount due and a possessory action to recover the articles pledged, or damages for their detention. The only ground of equitable jurisdiction over an action for the redemption of personal property pledged, besides the necessity of a *discovery*, and perhaps an *assignment of the pledge*, is the necessity of *taking an account*. It seems to be fully settled that the *account* on which equity bases its jurisdiction must be really one; that is, not having only one item on one side and a number of set-offs on the other, but a series of transactions on both sides. And the court held, that where an action is brought to redeem certain securities in the hands of the defendants, as stock brokers, upon paying the amount due thereon, and for an injunction order restraining the defendants from selling such securities until an account can be taken of the amount due the defendants, it cannot be sustained where it appears that the claim on the part of the defendants can only consist of one item: the original advances by them, or so much of it as remained unpaid.

The court held, further, that every sum paid or to be credited in that account forms a subject of set-off in an action at law, even including any liability of the defendants, as alleged in the complaint in the case before the court, for selling any of the original pledged stock below its market price, as such liability forms a subject of counter-claim in an action for the loan under the first subdivision of section 150 of the Code of Procedure, and, it was held *unliquidated damages* for an entirely unauthorized sale of pledged stocks or securities can form no part of an *account* to give jurisdiction to a court of equity. These questions of practice were very fully and ably discussed by Robertson, C. J., and he showed very conclusively that the positions taken were entirely sound, both upon principle and upon the authority of cases which he examined, and which are cited in his opinion.

The chief judge also discussed the question of the *liability* of the pledgee in cases like the one at bar, and held that sales of the stock below the market price, when duly authorized, would not make the pledgee liable for the difference, unless made with intent to injure the pledgor beyond the mere realization of the amount due

the pledgee, as in other cases of abuse of lawful authority, and that something besides a mere sale below the market price is necessary to show such intent. And it was argued that brokers, who are mere pawnees, are not bound to use even the same diligence as an agent to obtain the best price for the pledge sold; and an agent would not be held liable except for extraordinary negligence, which must be proved, not presumed. It was stated that there must, at least, be such recklessness shown in the mode or time of selling as to establish an intent to injure the pawnors before the pawnees can be made liable for any loss (*Durant v. Einstein*, 35 *How. Pr. R.*, 223; *S. C.*, 5 *Rob. R.*, 423).

A pledgee accepting goods from the pawnor is ordinarily estopped from denying the title of the pledgor at the time of the bailment, but may assert that his title has been defeated (*Thorne v. Tilbury*, 27 *L. J. N. S. Ex.*, 407).

In some cases where a pledge has been made to secure an illegal demand, the courts have held that the pledgor is not entitled to have restitution of the same, except upon the usual terms of redemption. For example, the Supreme Court of Tennessee held, where a person had borrowed money at usurious interest, which the contract did not exhibit on its face, and gave a pledge for its repayment, that he could not treat such contract as illegal, and sue for the recovery of the pledge, without a tender of the money actually due, and legal interest thereupon. There being no statute to the contrary, the general rule in equity in such cases is enforced there, that he who desires equity must do equity; and that requires payment of the money actually borrowed, before the pledgor can claim the restoration of his pledge (*Carusey v. Yates*, 8 *Humph. R.*, 605). And the Supreme Judicial Court of Massachusetts has decided that one who has voluntarily made a pledge, to secure the payment of an illegal demand against him, is not afterward entitled to reclaim the same without payment of the demand.

In this case the contract was declared to be illegal because it was made on Sunday, and Chapman, J., who delivered the opinion of the court said: "Under the instructions given by the judge, the jury may have found that the plaintiff delivered the watch to the defendant voluntarily. He seeks to recover it back on the ground that he delivered it as a pledge for the payment of a debt which he was not legally liable to pay, because it was for the use

of a horse and wagon which the defendant had let to him to enable him to violate the law for the observance of the Lord's day. It is true that the law would not enable the defendant to recover such a debt (*Way v. Foster*, 1 *Allen*, 408). But neither will it enable the plaintiff to recover back his property given in pledge for the debt, any more than to recover back the money after paying it. In all such cases, the maxim *potior est conditio possidentis* is applicable. The plaintiff has, at least, as little claim to the aid of the law as the defendant" (*King v. Green*, 6 *Allen's R.*, 139, 140).

It is possible that the decision in the case of *Causey v. Yates*, might have been placed upon the same ground as that in the case of *King v. Green*; but it is probable, that the more appropriate reason found for it is the one suggested; that is, the well settled rule in equity, that he who seeks equity must first do equity. On the contrary, the present Supreme Court of the State of New York has recently held that a provost marshal could not, under the act of congress entitled "An act for enrolling and calling out the national forces, and for other purposes," passed March 3d, 1863, exact of drafted men, volunteers, or those offering substitutes, the deposit of money or property to be forfeited to the government if such drafted men, volunteers or substitutes did not report themselves at the proper rendezvous; and that such a power could not be conferred upon a provost marshal by either the war department or the provost marshal-general; nor could either adopt, and by adoption ratify and make valid, a pledge exacted by a provost marshal for such a purpose.

The court held that congress, only, could confer such a power, or adopt and ratify such a pledge where taken without its authority, and it was further held, that a public officer who acts without authority, or exceeds his authority, is liable as is a private agent, on the contract made, or for the act done without or in excess of his authority; and that the ratification by the principal will not relieve him from such liability to the injured party. Where, therefore, such an agent exacts a pledge of property without authority of the government, and an action is brought by the pledgor to recover it back, while it is in the possession of such agent; the decision of the court is, that he is liable for such property; and even the adoption of the act by the principal will not

shield him from liability. The judgment entered at the circuit, upholding such a transaction, was accordingly reversed.

The opinion of the court was pronounced by Mullin, J., who examined the case with great care and legal acumen, and the judges seem to have been unanimous in the result which the reasoning produced (*Richardson v. Crandall*, 47 Barb. R., 335).

When this case was before the Circuit Court, the judge held that the pledgor was not entitled to his action for the restitution of the pledge, for the reasons: 1st. That the act of requiring indemnity was not only not within any inhibition in the case of public policy, but was entirely justifiable by the circumstances, if not one eminently meritorious. 2d. That the act of taking the pledge did not come within any statutory prohibition of a thing done by color of office, nor within any definition of it regarded as an offense against law or merit. 3d. That the *agreement was executed*; and on the principle that in case of an executed contract, where the parties are in *pari delicto*, the condition of the defendant is always preferred, the pledgor could not have his action for the pledge without redeeming it; and finally, the Circuit Court held that there was nothing in the objection that the agreement was void for *want of consideration*. It was argued that the action was not brought upon the *agreement*; and after a party has voluntarily performed an agreement, it is too late for him to urge such an objection (*Richardson v. Crandall*, 30 How. Pr. R., 134). But the court, at General Term, held the agreement was executory, and could not be said to be executed until the right of redemption was foreclosed. It was said, that as well might the pawnbroker insist that he could hold the pawn upon the ground of the contract being executed; that in both cases the property is left in pursuance of a contract which is in one sense executed when the pawn or pledge is delivered, on terms agreed upon between the parties, but it is not executed in the only sense in which the term is used in the law where the party is estopped from asserting a claim to the property pawned or pledged. And it was also held at General Term that the pledge was wholly without consideration, and for that reason the pledgor might recover the property pledged.

And in opposition to the decision in 8 Humphrey, the Superior Court of the city of New York has decided that under the usury laws of the State, where the owner of stock pledges it

as collateral security for the payment of a usurious loan, he may, on demand of the stock and a refusal to return it, recover its value in an action of trover. But it will be recollected that, by the statute of New York, a usurious contract is actually void, and this makes the rule different from that which prevails in Tennessee (*Cousland v. Davis*, 4 *Bosw. R.*, 619).

CHAPTER L.

THE OPERATION OF BANKRUPT LAWS IN CASES OF PLEDGE — THE DOCTRINE OF THE ENGLISH AUTHORITIES UPON THE SUBJECT — THE DOCTRINE OF THE AMERICAN CASES ON THE POINT.

THERE has been considerable discussion and not a little litigation, especially in Great Britain, in respect to the effect of bankrupt laws upon the rights of the parties to a pledge. It was, at one time, doubted whether a pawnbroker was a trader subject to the provisions of bankrupt laws; but the doubt seems to have been removed, at an early day, by the holding of the judges that a pawnbroker remained liable to them, as such, even though he had ceased to take in pledges, but continued to sell the unredeemed pledges he had on hand (*Highman v. Molloy*, 1 *Atk. R.*, 205; *Rawlinson v. Pearson*, 5 *Barnw. & Ald. R.*, 128).

In 1861 the British parliament passed an act to amend the bankruptcy laws, which has been held to control the question and place it at rest (24 and 25 *Vict. ch.* 138). But at common law and in equity a pledge deposited as a security for money advanced is in the nature of a mortgage, and can only be redeemed on payment of the money due, so that, in most cases, the property of the bankrupt in pledge must be sold, and the deficiency proved as a debt (*Ex parte Twogood*, 19 *Ves., Jr., R.*, 231). There can be no tack-ling, however, by the pawnee against creditors or assignees for valuable consideration (*Adams v. Claxton*, 6 *Ves., Jr., R.*, 226; *Vanlerzee v. Willis*, 1 *Bro. C. C.*, 21). But an equitable mortgagee, having a simple deposit of title deeds and no power of sale, cannot realize without an order of the court, made on petition; and the court will not interfere where the deposit is made to a solicitor to secure future costs (*Ex parte Wake*, 2 *Dea. R.*, 352). It has been held, however, that a petition is not necessary where the sale takes

place by agreement with the assignees, and where there is no dispute between the parties (*Ex parte Whitebread*, 3 *Dea. R.*, 311).

The Bankrupt Law Consolidation Act of England, passed in 1847, gives the assignees of a bankrupt power to redeem goods deposited or pledged, by the payment of money or performance of condition, as fully as the bankrupt himself could have done (12 and 13 *Vict.*, *ch.* 106). This may be regarded as a legislative recognition of an equitable doctrine in these cases; and, accordingly, it has been held, where a bankrupt had contracted to buy some bank shares, leaving the certificate in the hands of the vendor as a security for the purchase-money, that the latter was entitled, as in the case of an equitable mortgage, to an order for the sale of the shares in satisfaction of the unpaid purchase-money, with liberty to prove for the difference, in conformity to the rule that a bankrupt's property pledged must be sold and the excess proved as a debt (*Ex parte Shepherd*, 2 *Mont.*, *Dea. & De G. R.*, 431). And it has been held that the deposit of a purchase deed, assigning a house and also the furniture in it, will not include the furniture where the memorandum of deposit does not mention the furniture. It seems the furniture should be expressly named in the agreement, and a schedule of the articles annexed to it if it is to be affected by such a deposit (*Ex parte Hunt*, *re. Amer*, 1 *Mont.*, *Dea. & De G. R.*, 139). Where money has been advanced by a creditor to the bankrupt, either upon a mortgage or other security, which fails through bankruptcy intervening, proof may be made for the amount of money advanced (*Ex parte Corning*, 9 *Ves., Jr.*, *R.*, 115). And if a security is deposited generally for past and future advances, and at the time of the bankruptcy the creditor has two demands against his debtor, one provable under the fiat and the other not, he may apply his security, in the first instance, to reduce that demand which is not provable (*Ex parte Hunter*, 6 *Ves., Jr.*, *R.*, 94). And a creditor who has a bond deposited with him may apply it to part of the debt, and prove for the residue. It is held that the court will not order the security to be given up (*Ex parte Amphlets*, 1 *Mont. R.*, 77).

It has been decided that a mortgagee or a pawnee may either pray a sale and prove for the deficiency, or he may throw up his securities and prove his debt generally, without prejudice to his claim or any surety for the debt, or he may take the security *at its value* and prove for the difference (*Ex parte Grose*, 1 *Atk. R.*,

105; *Ex parte Burnett*, 2 *ib.*, 528). If he wishes to vote in the choice of assignees, he has a right to require the value to be estimated, and to vote in respect of the difference. He is not bound to wait till after the value has been determined by sale (*Ex parte Nunn*, 1 *Rose's R.*, 322). The value in such a case is to be taken at the market price of the day of choice of assignees (*Ex parte Greenwood*, *Buck's R.*, 323). But when once he has elected to give up his securities he cannot retract, even though the sale realized more than his debt (*Ex parte Downes*, 18 *Ves. Jr.*, *R.*, 290). Nor can he, after he has obtained the common order for sale of a security, with liberty to prove for the deficiency, elect to abandon that order and prove for his whole debt, retaining his security, though the order had not been acted on, and he was not aware of his rights when the order was obtained (*Ex parte Davenport*, in *re Buxton*; 1 *Mont. and Dea. R.*, 313; *Ex parte Spear*, 12 *L. T., N. S.*, 55). Also where a creditor had a lien on the property of the bankrupt for his debt, and proved under the commission, he was held to be concluded by proving his debt, and voting in the choice of assignees (*Ex parte Solomon*, 1 *Glyn and Jam. R.*, 25). But a creditor having joint property of the bankrupts in pledge, and selling the same after the bankruptcy, may, notwithstanding, prove the remainder of his debt under the separate estates of the bankrupts, if there is no other joint property (*Ex parte Davenport*, 1 *Mont. and Dea. R.*, 313; *Ex parte Gallu*, 2 *Madd. R.*, 262).

Where goods, in which the bankrupts were jointly interested with A. B., were pledged to secure the payment of an acceptance of the bankrupts, and part of the proceeds were received by the creditor before he applied to prove, it was held that he must deduct the amount received before he could prove on the acceptance; otherwise, if the goods had belonged to A. B. alone (*Ex parte Prescott*, 4 *Dea. and Ch. R.*, 23). And although it is true that the court may order proof to be admitted on a valuation instead of sale, its discretionary power in this particular is not too readily exercised. Such an application must depend on its special circumstances; among which the general benefit of the creditors, and the amount of the applicant's debt, are held to be very material. Therefore, where a creditor, to the amount of £3,021, prayed for leave to take the goods of the bankrupt at a valuation of £1,190, and to pay over any surplus above that sum to the assignees, Lord

Eldon refused the application, as not disclosing anything to exempt the case from the general practice. The reason for this is obvious. Until the sale, it is impossible to say what the debt is; and, also, if there is any doubt of the creditor's right to retain the security, he is entitled to a contest, with the rest of his creditors, to sustain his disputed title in a situation of predominant advantage (*Ex parte Smith, in re Harvey*, 1 *Ves. and Beam. R.*, 518; *S. C.*, 2 *Rose's R.*, 63).

A creditor having goods in pledge, and wishing to prove for the difference, so as to vote in the choice of assignees, may, on petition, obtain an order that a value shall be set upon them according to the market price of the day of choice, and prove for the difference, on undertaking that, if the goods sell for more than the value so set, the general body of the creditors shall have the benefit (*Ex parte Greenwood, Buck's R.*, 323). But the court will not make such an order where the goods have been delivered, not as a pledge, but for an undue preference; in such a case the creditor will not be permitted to prove for the residue without giving up the goods (*Ex parte Smith*, 3 *Bro. C. C.*, 46). But the mere selling of a pledge by a creditor without fraud does not destroy his rights to prove for the residue or remainder (*Ex parte Gallu*, 2 *Madd. R.*, 262, 267). And a creditor who holds goods as a pledge for his debt and interest, and who, at the assignee's request, delays the sale for a better market, may apply the proceeds in reduction of interest accrued, due since the petition (*Ex parte Kensington*, 1 *Dea. R.*, 58; *S. C.* 2, *Mont. and Ayr. R.*, 300). But this rule only applies where there is an express contract, or an implied one, as was held to be the fact in this last cited case, on the footing of merchants' accounts. And the agent of a bankrupt attorney, it seems, may prove for his whole debt, although he retains securities on which he claims a lien.

If a debtor, by way of collateral security, delivers a bill of exchange or promissory note to his creditor, without his name appearing upon the paper, it must be disposed of as a pledge, and the produce applied to reduce the debt, the residue of the demand only being provable under the commission (*Ex parte Troughton*, 1 *Cooke, B. L.*, 124). But the apparent intention of the parties makes it either a pledge or a purchase; as where H., a money broker, was in the habit of depositing bills of exchange with B. & Co., as a security for advances, but he did not indorse

the bills, nor were they negotiated by B. & Co., or ever presented for payment. One of these bills was for £1,000, accepted by C., who dishonored it, and, sometime afterward, became bankrupt on the 5th of March, 1824; H. also became bankrupt December 12th, 1825, when B. & Co. proved for the balance owing them, accepting this bill as a security, but made no attempt to prove the bill under C.'s commission until January, 1826, when the commissioners rejected the proof. It was held that the delivery of the bill by H. to B. & Co. must be taken to have been by way of pledge, to secure the amount of the advances then due from H. to B. & Co., and not with an intention to transfer the property in it; and that the amount of those advances having been paid, B. & Co. could not, under those circumstances, prove the bill under C.'s commission (*Ex parte Britton, in re Claughton*, 3 *Dea. and Chit. R.*, 35). And it is held that the difference between discount and deposit of bills depends on the intention to make an absolute transfer, and not on the mere fact of indorsement, though an indorsement is *prima facie* evidence that the transaction is one of discount, unless the object of mere deposit is clearly shown (*Ex parte Twogood*, 19 *Ves., Jr., R.*, 231, 232).

As to the difference between bills deposited as security, and property of which the value cannot be ascertained till a sale, it has been said that if the creditor is willing to take the bills at their amount, as they cannot produce more, the estate cannot be damnified, and his proof should be admitted for the difference (*Ex parte De Tasted*, 1 *Ves. & Brat. R.*, 240). And the proof of a creditor who claims to retain securities, or who has interests inimical to the general creditors, ought not to be rejected (for the amount of his debt beyond the value of his securities) on the ground that he will, by his proof, be enabled to elect himself an assignee (*Ex parte De Tasted, supra*; and *vide Ex parte Hopley*, 1 *Jac. & Walk. R.*, 423). Nor can his claim be resisted because he has property belonging to the estate in his possession. That is held to be only a ground to restrain payment of the dividends, or to require security from the creditor that he would give up the property if the court should be of opinion that he had no right to retain it (*Ex parte Dobson*, 1 *Mont. & Ayr. R.*, 606; *S. C.*, 4 *Dea. & Chit. R.*, 69; *Ex parte De Tasted*, 1 *Rob.'s R.*, 324). And where the property pledged is claimed by a third person, the pawnee may enter a claim on the proceedings for the whole amount till the legal right to the property is determined

(*Ex parte Williams*, 4 *Dea. & Chit. R.*, 180). Where a chose in action is assigned, the security, if there be one, must be delivered over at the time of the assignment, and in assigning *debts* everything must be done that is equivalent to the delivery of the chattels personal (*Jones v. Gibbons*, 9 *Ves., Jr., R.*, 407, 410). Thus a bond, when assigned, must be delivered up to the assignee; and when a debt is assigned, notice must be given to the debtor or other party *from whom* the assignor is to receive the money, even though a security (as a charter party) has been delivered to the assignees (*Royal v. Rowles*, 1 *Ves., Jr., R.*, 344; *S. C.*, 1 *Atk. R.*, 171; *Gardner v. Lachlan*, 8 *Sim. R.*, 123). And the reason assigned is, that until this is done the assignor would be able to obtain payment of the debt, which is tantamount to having it in his order and disposition. Notice of a dissolution of partnership is not notice to the partnership debtors, unless it can be reasonably inferred that they have seen it (*Ex parte Ushouse*, 1 *Glyn & Ja. R.*, 358; *Dean v. James*, 1 *Nev. & Man. R.*, 398).

The deposit of a warrant of attorney with a creditor, without notice to the party who had executed it, was held insufficient to take it out of the reputed ownership of the depositor, though the deposit took place through the agency of the solicitor of the acceptor of the bill of exchange, and who, *as such solicitor*, had attested the warrant of attorney. Nor does it make any difference that the warrant of attorney was executed to secure a sum previously secured by a bill of exchange; for, contrary to the rule as to restitution in the case of real property, such notice to the solicitor is not notice to the client. The deposit of a bill of exchange, though not indorsed (and, *a fortiori*, when indorsed), is good without notice, and the depositor is entitled after bankruptcy to have it indorsed, and to the common equitable mortgagee's order (*Ex parte Price*, 3 *Mont. Dea. & De G. R.*, 586; and *vide ex parte Bennett*, 1 *De Gex's R.*, 194).

In one case a bond was executed to secure payment of bills of exchange. The bond was mortgaged, together with the bills which were indorsed. The bonds and bills were deposited by way of sub-pledge, and no notice of the sub-pledge was given to the obligor. Under these circumstances, it was held that the sub-pledge was good against the assignees (*Ex parte Bennett*, 1 *De Gex's R.*, 194).

The bare possession of goods intrusted to the bankrupt *for a*

specific purpose (as a pledge), without any power given him to dispose of them, is not sufficient to make it a case of reputed ownership, unless, indeed, the owner has been guilty of laches, and is thus allowed the bankrupt to gain a false credit (*West v. Skip, Ves., Sr., R.*, 243). But goods sent on sale or return, and kept undistinguished with the rest of the bankrupt's stock, pass to the assignees as being in his order and disposition, notwithstanding any alleged custom or usage of trade by which goods so deposited did not lead to the belief that they belonged to the trader (*Ex parte Keepland, in re Clapham*, 4 L. T., N. S., 808).

A delivery of goods cannot be qualified by any secret understanding between the parties so as to defeat the claims of their assignees (*Holroyd v. Gwynne*, 2 Taunt. R., 176). If the removal takes place on the very same day when the act of bankruptcy is committed, although in point of time it is prior to the actual commission of it, the rights of the assignees have been held to attach (*Arbourn v. Williams*, 1 Ry. & Mon. R., 72). And if a person who has given a bill of sale or instrument remains in possession of the goods therein enumerated, the registration of the bill of sale will not prevent the goods from passing as goods in the order and disposition of the bankrupt, with the consent of the owner (*Bradger v. Shaw*, 2 Ell. & Ell. R., 472).

There are some modes of pledging property which have been held under the British bankrupt laws to be in themselves acts of bankruptcy; as, for instance, the assignment of the whole or principal part of the bankrupt's property by bill of sale, even though such bill of sale was not executed spontaneously, if it appear that the provisions of the deed must necessarily have the effect of delaying or defeating creditors, or to render it immediately impossible for the bankrupt to carry on his business, or whether it was simply an endeavor to put all his property out of the reach of liability to pay the debt (*Ex parte Wensley*, 1 De Gex, Jam. & Sm. R., 273; S. C., 1 De Gex, Jam. & Sm. Bankruptcy Appeals, 49; *The Lilburne*, 12 L. T. N. S., 209; *Goodricks v. Taylor*, 2 Hurl. & Nor. R., 380; *Young v. Fletcher*, 34 L. J. N. S. Ex., 154; S. C., 11 Jur. N. S., 449; S. C., 12 L. T. N. S., 392; *Goodricks v. Taylor*, 1 De G., Jam. & Sm. R., 135). In the last mentioned case a mortgage of property by a surety was held bad on the ground that it was an act of bankruptcy.

Contracts, express or implied (as a general lien), are protected

from the operation of bankruptcy where they are *bona fide* (*Bowman v. Malcolm*, 11 *Mees. & Welsb. R.*, 844). Where a creditor had advanced money on a ship in course of construction, "such advance to be a charge on the vessel," the creditor's lien was held not to be destroyed by the debtor's bankruptcy during the building (*Swainston v. Clay*, 4 *Giff. R.*, 187). And in another case, where the owner for life of some jewels lent them to her daughter, whose husband became bankrupt, it was held that the mother's lien was not defeated by the goods being in the order and disposition of the bankrupt husband (*In re Robertson*, 10 *L. T. N. S.*, 105). And where the *bona fides* of the party advancing money and receiving a pledge come in question, it is for the jury to judge, from all the circumstances, what the intentions of the parties were. It has been held that mere knowledge that the pledgor was in embarrassed circumstances is not sufficient; and by analogy with the cases in which it has been held that a *bona fide* execution is defeated by bankruptcy before the sale, so, in general, a contract to pawn, though *bona fide* entered into, would be defeated if notice of the act of bankruptcy were given before delivery (*Vide White v. Bartlett*, 9 *Bing. R.*, 378; *Udall v. Walton*, 14 *Mees. & Welsb. R.*, 254; *S. C.*, 9 *Jur.*, 215). And where a transaction, *prima facie* good, is impeached as wanting in *bona fides*, the proper direction seems be that, unless the jury come to the conclusion that the debtor had the intention of defeating the law and preventing the due distribution of his assets by preferring one creditor at the expense of the rest, the transaction stands good in law. The whole question turns upon the intention of the trader in disposing of his goods to the particular creditor (*Bills v. Smith*, 34 *L. J. N. S. Q. B.* 68; *S. C.*, 12 *Jur. N. S.*, 155; *S. C.*, 12 *L. T. N. S.*, 22; and *vide Regina v. Mandee*, 4 *Fos. & Fin. R.*, 45; *Regina v. Radnitz*, *Ib.*, 165).

As a general principle, the title of the assignees to the bankrupt's property dates from the act of bankruptcy; for though they have no title till their appointment, yet, when appointed, their title extends backward, and relates to the act of bankruptcy (*Kyneston v. Crouch*, 14 *Mees. & Welsb. R.*, 274; *Fawcett v. Fearne*, 6 *Queen's Bench, R.*, 20). But this holds good only where the bankruptcy takes place in consequence of some proceedings by creditors; for, where there is no petitioning creditor, but the man is declared bankrupt on his own petition, there is no relation (*Steven-*

n v. Newnham, 13 *Com. Bench R.*, 285; *Nicholson v. Gooch*, *Ell. & Black. R.*, 999; *Ex parte Harrison*, 26 *L. J. N. S. ank.* 30; *Parull v. Best*, 3 *Best & Smith's R.*, 537; and *vide Opping v. Keysell*, 16 *Com. Bench N. S. R.*, 258; *S. C.*, 10 *ir. N. S.*, 774).

The assignees of a bankrupt have no right to interfere with the mortgage of the bankrupt's interest, except to redeem. But if the estate has been mortgaged considerably below its value, the court will allow the assignees to fix a reserved bidding at the sale (*Ex parte Ellis*, 3 *Dea. & Chit. R.*, 297). In this case the mortgage was for £48,000, and the equity of redemption was valued at £3,000. But where policies of insurance, valued at only £500, were deposited by way of equitable mortgage with a creditor whose debt was £16,000, the court refused a reserved bidding to the assignees, for "they have no right to interfere with a mortgage, except to redeem." They might, however, have permission to bid, but they must abide by their bidding (*Ex parte Barnard*, 3 *Dea. & Chit. R.*, 291). But in one case leave was given to the assignees to fix such a bidding as the commissioners should approve (*Ex parte Lackington*, 3 *Mont., Dea. & De Ge. R.*, 331). And here an equitable mortgagee with leave to bid was the only bidder, the court opened the biddings on an offer more than twice the amount he had given, in accordance with the practice of the Court of Chancery (*Ex parte Lee*, *De Gew's R.*, 628).

In an early case in the English Court of Chancery, Lord Hardwicke refused to allow a depositor of stock, in the hands of a bankrupt, to prove for interest, saying there is a plain distinction between debts that carry interest and a special deposit of goods and stock, for in the former the interest shall be continued down to the date of the commission, but in the latter the interest stops from the time of the deposit (*Bromley v. Child*, 1 *Atk. R.*, 259). If the security be insufficient, the mortgagees cannot prove for interest beyond the date of the adjudication, even though the sale was postponed at the request of the assignees, and for the benefit of the bankrupt estate (*Ex parte Badger*, 4 *Ves., Jr. R.*, 165; *Re Lightfoot*, 18 *L. T. R.*, 54; *Ex parte Baldwin*, 33 *ib.*, 263). The same doctrine was held by Commissioner Evans on the authority of a case in which, pending an appeal by an equitable mortgagee, it was agreed between the parties that the property should be sold, and the proceeds invested by the assignees to abide the

result of the appeal, which was accordingly done, though the assignees, against the wish of the mortgagee, deposited the money in a bank which paid only two and a half per cent interest. The court held that, though the mortgagee was entitled to the interest actually made for the investment, he was not entitled to have interest calculated on his debt subsequent to the date of the first, for there was no mention of interest in the agreement, and interest is not allowed in bankruptcy, except in the case of bills and notes, unless it is provided for in the contract, or unless it arises from the dealings of the parties constituting an implied agreement to pay interest on the posting of merchants' accounts (*Vide Ex parte Kensington*, 1 *Dea. R.*, 58; *S. C.*, 2 *Mont. & Ayr. R.*, 300).

Goods pledged expressly to secure a creditor, who has previously accepted and paid bills drawn on him by the bankrupt, are released from further charge as to other bills taken up and paid subsequently, if the amount of the *original sum* paid on account of the bankrupt has been repaid to the creditor, without the goods being sold (*Birdwood v. Raphael*, 5 *Price's R.*, 593). So also where a creditor's right to retain property was disputed on the ground of preference, the court refused his application to take it at a reduction, to prove for the difference, and vote in the choice of assignees (*Ex parte Barclay*, 1 *Glyn & Jameson's R.*, 272). And the court, also in the exercise of its discretion, refused to order the sale of a bond, but allowed the creditor to prove for his whole debt, because if it had been sold at the time it would have produced nothing, though it might afterward become valuable (*Ex parte Smith and Strickland*, 2 *Glyn & James. R.*, 105).

The foregoing principles and rules are settled by the English authorities, but they will generally be recognized as in point, upon the same subject, in the American States. The courts of the United States have laid down similar principles in cases arising under the federal bankrupt act of 1841; and they are probably equally pertinent to cases arising under the present law; and indeed to cases, as a general rule, arising under the insolvent laws of the several States.

By the second section of the bankrupt act of 1841, it was provided to the following effect: "Nothing in this act contained shall be construed to annul, destroy or impair any liens, mortgages or *other securities* or properties, real or personal, which may be valid by the laws of the States respectively." And by the bankrupt act

now in force, it is provided as follows: "Where a creditor has a mortgage or *pledge* of real or personal property of the bankrupt, or a lien thereon for securing the payment of a debt owing to him from the bankrupt, he shall be admitted as a creditor only for the balance of the debt after deducting the value of such property, to be ascertained by agreement between him and the assignee, or by a sale thereof, to be made in such manner as the court shall direct; or the creditor may release or convey his claim to the assignee upon such property, and be admitted to prove his debt" (*U. S. Bankrupt Act of 1867*, § 20).

Upon this point, Mr. Justice Story, who gave the prevailing opinion of the Supreme Court of the United States, in a case arising under the act of 1841, said: "Where creditors are spoken of 'who claim a debt or demand under the bankruptcy,' we understand the meaning to be that they are creditors of the bankrupt, and that their debts constitute present subsisting claims upon the bankrupt's estate, unextinguished in fact or in law, and capable of being asserted under the bankruptcy in any manner and form which the creditors might elect, whether they have a security by way of pledge or mortgage therefor or not. If they have a pledge or mortgage therefor, they may apply to the court to have the same sold, and the proceeds thereof applied toward the payment of their debts *pro tanto*, and to prove the residue; or, on the other hand, the assignees may contest their claims in the court, or seek to ascertain the true amount thereof, and have the residue of the property, after satisfying their claims, applied for the benefit of the other creditors" (*Ex parte Christie*, 3 How. U. S. R., 292, 315).

It is laid down by a writer on bankruptcy, that "if a creditor has a security or lien, he is not compellable to come in under the commission; he may elect to stand out, and rely on his security or lien. * * * But if he does prove, he relinquishes his security for the benefit of all" (*Cullen on Bankruptcy*, 145, 149). And this doctrine is in accordance with the general terms of the English authorities hereinbefore cited; and the only difference between this doctrine and the rule adopted in this country is, that the assignee of the bankrupt may contest the right of the pledgee, and the court has the entire control of the subject, which in *reality* is not much different from the English rule.

A case came before the United States Circuit Court, under the

bankrupt act of 1841, in which it appeared that A. and B., being engaged, in 1839, in the manufacture of cutlery, borrowed of C. a sum of money payable in four years, with interest semi-annually, and on the same day gave him a deed of all the machinery in their manufactory, with all the tools and implements of every kind thereunto belonging and appertaining, together with all the tools and machinery for the use of the said manufactory which they might at any time purchase for four years from that date, and also all the stock which they might manufacture or purchase during the said four years. On the 26th of August, 1842, A. and B. filed their petition to be declared bankrupts, and subsequently were so declared, and an assignee appointed. On July 16th, 1842, for breach of the conditions of the mortgage, the agent of C. took possession of the property, including the machinery, etc., which were in the possession of the factory when the mortgage was made, and also machinery, tools and stock in trade which had been made and purchased after the execution of the mortgage. On petition of the assignee in bankruptcy of A. and B. for an order of court authorizing him to take possession, it was held by the court, 1st. That the mortgage and the possession taken on July 16, 1842, constituted such a lien in favor of the mortgagee to the property acquired subsequently to the time of executing the mortgage as was protected under the provision in the second section of the bankrupt act. 2d. That such stipulations in a mortgage, in regard to property subsequently acquired, protected such property from other creditors of the mortgage (*Mitchell v. Winslow*, 2 *Story's R.*, 630). And the same court held in another case that where property was attached upon mesne process, and after judgment was obtained, the defendant filed his petition to be decreed a bankrupt, the right of the attaching creditor had attached absolutely to the property, and by the law of Massachusetts remained a fixed and permanent lien for thirty days after the judgment, by means of which the creditor at his election might obtain a preference of satisfaction out of the property attached over all other creditors (*In the matter of Cook*, 2 *Story's R.*, 376).

The Supreme Judicial Court of Massachusetts decided that where a creditor attaches his debtor's property on mesne process and seizes the same on execution within thirty days after he recovers judgment, he has a lien or security on the property, which cannot be annulled, destroyed or impaired by his debtor being

declared a bankrupt under the United States bankrupt act of 1841, on a petition filed after such seizure of the property, though before the time when by law it could be sold on execution (*Ames v. Wentworth*, 5 Met. R., 294).

Under the bankrupt law of 1841, it has been decided by the Supreme Court of the United States that the District Court, when sitting in bankruptcy, had jurisdiction over liens and mortgages existing upon the property of bankrupts, so as to inquire into their validity and extent, and grant the same relief which the State courts might or ought to grant. The control of the District Court over proceedings in the State courts upon such liens was held to be not over the State courts themselves, but upon the parties, through an injunction or other appropriate proceeding in equity (*Ex parte Christy*, 3 How. U. S. R., 293; and *vide Ex parte Foster*, 2 Story's R., 131). And the provisions of the bankrupt act now in force in this regard are substantially the same as those of the act of 1841.

Of course, a pledge or other security given in fraud of the bankrupt act cannot be sustained, and this question may always be raised in the court having cognizance of the bankruptcy proceedings (*Vide Bolander v. Getz*, 36 Cal. R., 105).

The courts of Maryland have held that in an action by a trustee in insolvency for the conversion of the insolvent's property, evidence by the defendant to prove that before the insolvent's application for the benefit of the insolvent law the property alleged to be converted was delivered by the insolvent to the defendant and held by him as security for the insolvent's indebtedness to him, is admissible. In other words, the law is such that a *bona fide* pledge made by a debtor, before proceedings have been initiated in behalf of the debtor for the benefit of the insolvent laws, will be sustained, and in such a case probably the right of the pledgee would be declared to be similar to that of a pledgee under the Federal bankrupt laws (*Dowler v. Cushwa*, 27 Md. R., 354).

The Superior Court of the city of New York has held that a mortgage upon a bankrupt's real estate is not such an adverse claim as requires an action to be brought by the assignee in bankruptcy under the eighth section of the United States bankrupt law now in force, nor will the foreclosure of the mortgage and the sale of the property in a suit to which the assignee is not a party constitute such an adverse claim where it does not appear that the

assignee had notice that the purchaser claimed adversely to his own title. This is an important decision, and will apply in principle as well to the case of a pledge of personal property, as to that of a mortgage of real estate (*Price v. Phillips*, 3 Rob. R., 448).

A case to the following effect came lately before the Supreme Judicial Court of Massachusetts. A maker of a promissory note, executed to an indorser a mortgage, which was recorded, the conditions of the instrument being to secure the indorser and not to pay the note. The maker failed, and the indorser also, after his liability was fixed. The court held that an indorsee of the note who proves it against the estate of the indorser, and votes for his discharge, is not entitled to have the mortgage assigned to him upon his withdrawing his claim. It seems, however, from the decision, that the indorser could claim such assignment if he had not proved the note in insolvency (*New Bedford Institution for Savings v. Fair Haven Bank*, 9 Allen's R., 175). The same court, however, had previously held that a creditor of an insolvent manufacturing corporation, who holds collateral security from a *stockholder* therein, may prove his whole debt against the corporation in insolvency without first applying the security in payment, or surrendering it to the assignees (*Cabot Bank v. Bodman*, 11 Gray's R., 135).

The cases are very numerous in the State reports in respect to this point under the State insolvent laws, but it is not compatible with the plan of this work to go into a general or special examination of them, and perhaps the foregoing is all that is necessary to be said upon the subject.

CHAPTER LI.

EFFECT OF THE DEATH OF THE PARTIES TO A PLEDGE—MEANS OF DETERMINING THE PARTY ENTITLED TO THE PROPERTY PLEDGED IN DOUBTFUL CASES—SOME MISCELLANEOUS POINTS IN RESPECT TO PLEDGES REFERRED TO.

THE effect which the death of one or both of the parties to a pledge produces upon the subject of the pledge, may be *inferred* from some of the statements hereinbefore made; but it is well to dwell a little upon the point in this place.

It was said, in some old English cases, that where goods are pawned generally, without any day of redemption, and the *pawnor* dies, the pawn is absolute and irredeemable; but that if the *pawnee* dies it is not so. In an early case, it was said that though the person that takes the pawn delivers it over to a stranger, yet if the pawnee dies the tender of the money must be to his executor, and not to the stranger; for the delivery makes but the naked custody of it; and if the delivery had been on consideration it does not alter the case, for the stranger is not privy to the first contract of pawning nor to the condition (*Ratcliff v. Davis*, *Cro. Jac.*, 244, *S. C.*, *Yelv. R.*, 178). More recent decisions in England, however, show that the right to redeem is not lost by the death of the pawnor, but goes to his personal representatives. For example, where A. borrowed £200 on pawn of some jewels and plate, worth about £600, taking a note from the pawnee, and afterward borrowed, at several times, three other sums of money of the pawnee, for which he gave his note, without referring to the jewels, the court permitted the executors to redeem, but only on payment of the money due on the notes as well as on the pawn (*Demandray v. Metcalf*, *Pre. Ch.*, 419). And in another case, in the English Court of Chancery, the executrix of a deceased pawnor was allowed to redeem securities pledged with the defendants, the testator's bankers (*Vanderzee v. Willis*, 3 *Brown's C. C.*, 21).

It may therefore be taken as well settled, by the English authorities, that the personal representative may sue on the contract of pawn, as on all other contracts made with the deceased, of which the breach occasions an injury to the personal estate, whether broken in his lifetime or subsequently to his death (*Vide Webb v. Cowdell*, 14 *Mees. and Welsb. R.*, 820). And, in like manner, the personal representatives are liable, as far as they have assets, on the contract of pawn as on other contracts of the deceased broken in his lifetime (*Morgan v. Ravey*, 6 *Hurl. and Nor. R.*, 265, 276). And, indeed, the personal representatives are in like manner liable, on such contracts of the deceased as are broken after his death, for the performance of which his skill or taste was not required, and which were not to be performed by the deceased in person; for the executors, as was said by Parke, B., in a case before the Court of Exchequer, are in truth contained in the person of the testator, with respect to all his contracts, except such

as depend on personal skill (*Wills v. Murray*, 4 *Exchequer R.*, 866; and *vide Broom's Legal Maxims*, 4th ed., 870, 872, 874).

The doctrine of the English courts upon this subject is recognized in all its effect by the American courts. This is abundantly apparent from authorities in a previous chapter referred to. In accordance with this doctrine, an action of trover was permitted by the Supreme Court of Illinois in favor of the pledgor against a party holding a promissory note under the administratrix of the deceased pledgee to recover said note (*Henry v. Eddy*, 34 *Ill. R.*, 508). And the rights of the personal representatives of a pledgor, in such a case, were recognized without apparent question by the Supreme Judicial Court of Massachusetts, where it was decided that the pledgee held the property pledged as a collateral security after, the same as before, the death of the pledgor (*Middlesex Bank v. Minot*, 4 *Met. R.*, 325). And in other cases it has been expressly held by the American courts that there is no time fixed for redeeming a pledge; the pawnor may redeem at any time; and that the right of redemption survives, on his death, to his legal representatives, against the pawnee and his representatives (*Vide Cortelyou v. Lansing*, 2 *Caines' Cases in Error*, 200).

It has been stated in a previous chapter that, upon the payment of the debt, or discharge of the obligation to recover which a pledge is made, the pledgee is bound to return the thing pledged to the pledgor or other person entitled to the same; and it was added that the pledgee must be careful to deliver the same to the proper person; for if he should deliver the same to a wrong person he would, nevertheless, be liable to respond in damages to the true owner. Now, while it is of the utmost importance that the subject of the pledge be delivered to the proper person, it is not always easy for the pledgee to determine who the proper person is; and it frequently happens that the property pledged is claimed by several adverse claimants. In such a case, it is but just that the pledgee should have some means of resort to ascertain, *judicially*, to whom the pledge should be delivered without involving himself in a bill of costs; and the law has provided the remedy, which is by a proceeding known as an interpleader.

An interpleader will be sustained where it is necessary for the protection of a person from whom several persons claim, legally or equitably, the same thing, debt or duty, but who has incurred no independent liability to any of them, and does not himself claim

an interest in the matter. A bill of interpleader, strictly so called, is where the complainant claims no relief against either of the defendants, but only asks that he may be at liberty to pay the money or deliver the property to the one to whom it, of right, belongs, and be thereafter protected from the claims of both (*Bedell v. Hoffman*, 2 *Paige's R.*, 199). And the allegations in every bill of interpleader should be : 1. That two or more persons have preferred a claim against the plaintiff. 2. That they claim the same thing. 3. That the complainant has no beneficial interest in the thing claimed ; and, 4. That he cannot determine, without hazard to himself, to which of the two or more defendants the thing of right belongs (*Atkinson v. Manks*, 1 *Cow. R.*, 691, 703). And the party bringing the action must be ignorant of the rights of the respective parties (*Wilson v. Duncan*, 11 *Abb. Pr. R.*, 3 ; *Bell v. Hunt*, 3 *Barb. Ch. R.*, 391 ; *Shaw v. Coster*, 8 *Paige's R.*, 339). Therefore, the action cannot be maintained where the plaintiff is prepared to deny the liability to either of the defendants (*McHenry v. Hazard*, 45 *Barb. R.*, 657). A party deposited money in a bank and soon after transferred his interest to another. A receiver of the property of the depositor claimed the deposit, and the one to whom it had been transferred brought an action against the bank therefor. The Supreme Court of the State of New York, at Special Term, held that, on payment of the money into court, the receiver should be substituted as defendant, in place of the bank. The bank held the money for the true owner, and had no interest in the question to whom it belonged. Under such circumstances the court thought that it would be obviously unjust to compel the defendant, against its own will, to remain a defendant in the action, and, perhaps, become liable for the costs of the litigation (*Fletcher v. Troy Savings Bank*, 4 *How. Pr. R.*, 383). And where money was deposited with a party to be paid on certain conditions, and an action was brought against the bailee of a third party, the Court of Appeals of the State of New York decided that the proper way for the bailee to protect himself and the one who was entitled to the money was by obtaining an order of substitution under section 122 of the Code of Procedure (*McKay v. Draper*, 27 *N. Y. R.*, 256). But this is under a special provision of the New York Code, which has provided a concurrent remedy with the action of interpleader, which is made available after action has been commenced.

They have a similar practice in England, where it is provided by statute that parties may have relief, under certain circumstances, as in a procedure by interpleader. And it has been decided that where a *defendant* is held in *assumpsit*, debt, detinue or trover for a matter in which he does not claim any interest, and also in cases of cross claims on the same subject-matter, parties may take the benefit of the statute as to procedure in interpleader (*Farr v. Ward*, 2 *Mees. & Welsb. R.*, 844). But it has been held that the court cannot give relief under this act to stockholders who are only *threatened* with proceedings. In such a case an action must be brought and the plaintiff declare before the court can interfere. Still the stockholder, acting in good faith, is entitled to his costs from the party ultimately unsuccessful (*Parker v. Linnett*, 2 *Dowl. R.*, 562).

Again, it has been held that the English act does not apply where the defendant has, by his own act, incurred a personal liability in respect to the subject-matter (*Horton v. Earl of Devon*, 7 *Dow. & Low. R.*, 206; *S. C.*, 4 *Eschequer R.*, 497). And the courts of New York have held substantially in the same way; and the courts of New York, as well as the English courts, have declared that the action of interpleader cannot be maintained where the plaintiff has rendered himself liable to two suits by his own act (*Morgan v. Fillmore*, 18 *Abb. Pr. R.*, 217; *United States v. Victor*, 16 *ib.*, 153; and *vide Desbrough v. Harris*, 31 *Eng. Law and Eq. R.*, 592, 595; *Cransley v. Thornton*, 7 *Sim. R.*, 391; *Glynn v. Locke*, 3 *Dru. & Walsh's R.*, 11; *Belcher v. Smith*, 9 *Bing. R.*, 82). And both the New York and the English courts have held that the action cannot be maintained, even where the plaintiff has incurred a personal liability to either of the contending parties (*McGraw v. Adams*, 14 *How. Pr. R.*, 461; *Shaw v. Coster*, 8 *Paige's R.*, 339; *Patroni v. Campbell*, 12 *Mees. & Welsb. R.*, 277).

Indeed, the New York courts hold that the provision of their Code of Procedure, for the substitution of parties, is founded on the English statute; and the decisions under that seem to have settled the rule that it is only where no other question than the *right of property* is to be litigated, that an interpleader can be allowed (*Sherman v. Partridge*, 1 *Abb. Pr. R.*, 256; *S. C.*, 11 *How. Pr. R.*, 154).

The English courts have held that their act does not apply where

a declaration contained a count *in case*, as well as in *trover* *awrence v. Mathews*, 5 *Dowl. R.*, 149). Nor to claims set up in consequence of proceedings in equity (*Sturges v. Claude*, 1 *Dowl. R.*, 505). Nor where the defendant has identified himself with the claimant by taking an indemnity from him (*Tucker v. Morris*, 1 *Dowl. R.*, 639). Nor where A. has given a promissory note to B. and B. has deposited it with C., who brings an action on it, is it any ground for obtaining relief under the act that an action is anticipated at the suit of the creditor (*Newton v. Moody*, *Dowl. R.*, 582).

But where two plaintiffs each claimed to be the lawful owner of the note, an interpleader issue was ordered (*Regan v. Serle*, 9 *Dowl. R.*, 193). And it would seem that where the defendant's claim is of the nature of a lien or pawn, he may interplead as to all but the value of his lien or claim to the property (*Best v. Heyes*, 3 *Q. B. & Finl. R.*, 113; *S. C.*, 32 *L. J., N. S. Ex.*, 129). It has been declared in England, however, that the act is seldom useful in pawn transactions, inasmuch as the general rule is, that it will not apply where the defendant claims *any* interest in the subject-matter of the suit (*Lindsay v. Barron*, 6 *Com. Bench R.*, 291; *Waddock v. Smith*, 2 *Bing. R.*, 84).

On execution in a county court in England, against the goods of a defendant in a suit of A. against B., goods in the hands of C. were seized, C. paid money to release them, and proceeded by interpleader. The goods originally belonged to B., but previous to the execution had been pawned with a pawnbroker (it did not appear by whom), and the duplicate had been deposited in the hands of C., by L., to redeem them, and hold them as security for the money advanced, and L. redeemed accordingly. There was no evidence to show the time at which or the circumstances under which L. became possessed of the duplicate, or that he had any interest therein. The court held that C. was entitled to the money paid to release the goods (*Furlber v. Sturmy*, 5 *Jur. N. S.*, 45 *ex*). It may be affirmed, on the whole, in opposition to the view before expressed, that the principle of interpleader may be quite useful in many cases of pledge (*Vide Cady v. Potter*, 55 *Barb. R.*, 463). There are some other points settled by authorities, in respect to pledges, independent of statutory provision, which might have been noted under previous heads, had the authorities been observed at the proper time. These points will now be noted without par-

ticular regard to the order in which the decisions are referred to.

The courts of New Jersey have held that, where coupon bonds of a corporation are deposited as collateral to secure notes on short time, it is presumed, in the absence of all special agreement, that they are not deposited as choses in action, to be collected by the pledgee, but as a pledge, to be sold after demand and notice, as in the case of a pledge of any article having a market value (*Morris Canal, etc., Company v. Lewis*, 1 *Beas. R.*, 323).

The courts of Kentucky have held that the deposit of bills of lading for cotton with a bank, without assignment or other writing, and without actual delivery of the cotton, is a sufficient transfer to pledge the cotton to the bank as security for the payment of money advanced by the bank upon the faith of the security so given, and that the lien acquired by the bank is paramount to a subsequent attachment lien (*Pettitt v. First, etc., Bank*, 4 *Bush's R.*, 334). But in the State of California, where it appeared, that a chose in action was assigned and delivered as collateral security for the payment of a debt due the assignee, the Supreme Court held that the assignment and delivery to the assignee of the chose in action was necessary to give the latter full authority to readily control the security and make it available. But it was decided that this did not necessarily constitute the transaction a chattel mortgage, as distinguished from a pledge, and that, under the circumstances, the transaction was a pledge. It was further held in the case that the pledgee, of a chose in action pledged as security for the payment of a debt, is not authorized to sell the pledge without calling on the pledgor to redeem, and giving him reasonable notice of his intention to sell; ordinarily, the chose in action could not be sold by the pledgee, but must be collected (*Gay v. Moss*, 34 *Cal. R.*, 125).

In a late case in the English Court of Common Pleas it appeared that A. was indorsee of a bill of lading, drawn in a set of three, of cotton, which had been lately landed, under an entry by A., at a sufferance wharf, with a stop therein for freight, which rendered it liable to the captain's lien for freight under 11 and 12 Vict., ch. 18, §4. On March 4th, A. obtained from M. an advance on the deposit of two copies of the bill, M. assuming the third to be in the master's hands; on March 6th, the stop for freight being then removed, A. obtained from B. an advance on the deposit of the third copy of the bill which A. had fraudu-

lently obtained. On March 11th, B. knowing of M.'s prior advance, sent his copy of the bill to the wharf, and had the cotton transferred into his own name, and afterward sold it and received the proceeds. The court held that the bill of lading, when deposited with M., retained its full force, though the cotton had been landed and warehoused; that there was a valid pledge of the cotton to M., and he could sue B. either for conversion of the cotton or for the proceeds of the sale.

The case was taken to the Exchequer Chamber, and the judgment of the Common Pleas was affirmed, and the foregoing views reiterated (*Meyerstain v. Barber*, 2 *Law R.*, 661; 2 *Com. Bench R.*, 38).

A case of considerable interest was recently decided by the Supreme Court of Indiana, which involved principles in relation to the subject of pledges. The case was this: A., being indebted to the Crescent City Bank, assigned, by an instrument in writing, to B., who was cashier of the bank, five hundred shares of the stock of the bank in trust, for the purpose of securing the debt. B. was not described in the writing as cashier, nor did he sign it as such. It was stipulated in the writing that, in case of a failure to pay the debt in installments, at specified dates, B. might sell the stock after giving twenty days' public notice. To a writ by C., to whom A. had sold the stock, subject to the payment of the debt to the bank, alleging a tender of the amount of the debt, and a refusal to transfer the stock to him, it was answered that, upon a failure to pay one installment of the debt, B., after giving the notice required, had sold the stock to the bank. The court held that the assignment of the stock was not to the bank, but to B., personally, and not as cashier, and the sale to the bank was consequently valid. Gregory, C. J., dissented, but the decision of the court was as here stated (*Crescent City Bank v. Carpenter*, 26 *Ind. R.*, 108).

Taking a bill of sale of personal property at a price less than its estimated value, with an agreement that the original owner shall have the same again at any time after a fixed day, upon refunding the price, with a small additional sum for trouble in trying to sell the same, was held, by the Supreme Judicial Court of Massachusetts, to amount only to a pledge, which is lost by giving possession of the property to the general owner (*Kimball v. Hildreth*, 8 *Allen's R.*, 167; and *vide Walker v. Staples*, 5 *ib.*, 34).

The Superior Court of the city of New York, some time since, decided that a mortgage of real property (with the bond to which it is collateral) is the subject of a pledge. Mortgages are now regarded as mere securities and chattel interests, and may be pledged like other chattels and things in action (*Campbell v. Parker*, 9 Bosw. R., 322).

A city, in the State of Indiana, pledged its stock in a railroad company as security for its bonds, issued in aid of the road; and the bonds provided that the holders might exchange the same for a like amount of the stock, and be substituted as stockholders in the place of the city. The Supreme Court of the State held that the bondholders had a lien upon the whole stock, but that one bond could not bind more than one share of stock (*Aurora v. Cobb*, 21 Ind. R., 492).

The Supreme Court of Louisiana has held that, in order to create a pledge, it is necessary not only that delivery should accompany the private deed, but also that the instrument should exhibit the nature and extent of the reciprocal rights and obligations of the contracting parties. And the same case holds that the assignment of a warehouse receipt, in the absence of an express stipulation that the property is given in pledge to secure the payment of a principal obligation, the amount of which is specified, does not confer a privilege upon the transferee (*Martin v. Creditors*, 15 La. An. R., 165).

By an act of the British parliament a penalty is imposed upon any person who shall detain the certificate of a vessel's registry, called the merchants' shipping act, and passed in 1864 (17 and 18 Vict., ch. 104). The Court of Queen's Bench has recently decided that the effect of this act is to make any pledge of the certificate, for any purpose whatever, though for a good consideration, illegal and void; and, consequently, any detainer of the certificate, so pledged, illegal. And it was held that when the person entitled to the custody of the certificate for the purposes of navigation is also the owner of the ship, he has a right of action against the party so detaining the certificate, in addition to his remedy in the former character, by a complaint before a justice; and this, though he be himself the pledgor, and for a good consideration. But the court questioned, whether an action at law would lie, by the party merely entitled to the custody, for the detainer, made unlawful by the penal enactment; and it seems

that, if it would, the declaration should, in that case, aver absence of reasonable cause (*Wiley v. Crawford*, 1 *Ellis, Best and Smith's R.*, 253, 265).

It is oftentimes quite difficult to determine whether a given transaction is a pledge or otherwise. The following was held by the Supreme Court of Wisconsin *not* to be a pledge. A. gave his note, to which was annexed the following: "Having deposited with B. (the payee) school-land certificates, numbers, &c., with authority to sell the same, on non-payment of this note, at either public or private sale, and apply the proceeds herein without further notice." The certificates were assigned in blank, and, on maturity, and non-payment of the note, were sold to the highest bidder for a small sum, less than the amount of the note, which was credited thereon. B. afterward assigned the note to C., who recovered judgment thereon against A., which remained unsatisfied. A. sued B. for the conversion of the certificates. It was held that the transaction was not a pledge of the certificates, and that A.'s interest in the land and certificates could not be extinguished or converted by a sale, as in the case of chattels; but that it was an equitable mortgage of A.'s estate in the land, upon which B., upon default in payment of the note, could take advantage only by a suit in equity for establishment of his lien, and for sale, if A. neglected to pay principal and costs by a given day (*Mourry v. Wood*, 12 *Wis. R.*, 413).

A recent decision made by the Supreme Court of the State of New York involves the question as to what constitutes a pledge. The plaintiff employed a broker to procure a loan for him upon stock. The broker applied to the defendant, who refused to make a loan. After informing the plaintiff of such refusal, the broker went a second time to the defendant, who then said he would *buy* the stock. The plaintiff being told by the broker that the only way he could get the money was to *sell* the stock, said he would sell it. The broker and the plaintiff then went to the defendant's office and made a sale of the stock to him, and a bill of sale was executed and the money paid. It was then agreed that if the plaintiff brought the money back in ten days the defendant would return the stock. The court held that the transaction did not constitute a pledge, and that an action would not lie against the defendant to recover damages for a conversion of the stock, although the amount of the loan was offered to the

defendant on the morning of the eleventh day after it was made ; but it was neither repaid nor tendered within the *ten* days. The court also held that if the transaction was a *pledge*, the defendant was entitled to interest on the loan, unless the agreement was that he would accept the principal without interest, if tendered within the time ; and that the tender of the principal, after the day, without offering to pay the interest which had accrued after the day, was insufficient. But it was expressly declared that the transaction was either a conditional sale or a mortgage ; and that in neither case could trover be maintained, for a failure to return the property, upon a tender being made after the day limited for payment.

Brady, J., dissented, and expressed the opinion that the stock was deposited in a way which constituted the transaction a pledge only and not a mortgage ; and that the offer of the plaintiff to pay the amount of the loan, on the morning after it became due, was sufficient to justify the action, unless the defendant had, at that time, lawfully sold the stock, which it was for him to show. But the opinion of the majority of the judges was adverse to this view, and the judgment was in favor of the defendant (*Woodworth v. Morris*, 56 *Barb. R.*, 97).

An important case has, quite lately, been disposed of by the Commission of Appeals of the State of New York, not yet reported, involving the question of pledges. The action was brought to recover the value of a cargo of corn shipped from Chicago to Buffalo and thence to New York by V., consigned to the defendant. At Chicago V. made his bill of exchange for \$3,500 at sight, directed to defendants at New York. The plaintiff discounted the bill for V. upon his transferring and delivering, as surety therefor, a bill of lading of the corn. The defendant received the corn but refused to pay the bill, although notified of the transfer to the plaintiff before receiving the corn. The defendant claimed to hold the corn for a balance due them from V., and that a draft for \$1,220, paid by them for V., should be deducted from the amount of recovery as money advanced to purchase the corn.

The court held that the transfer of the bill of lading to the plaintiff, under the circumstances, transferred also the title to the corn therein described, conditioned upon the acceptance of the draft. Upon such acceptance the title would pass to the acceptor ; but upon refusal to accept, the plaintiff's title continued unimpaired,

and the defendant was liable to the plaintiff for the money advanced upon the security of the bill of lading. And it was declared that, where the consignor is indebted to the consignee for advances, and has agreed to give him a prior security upon the property, the lien of the latter is good as against the former; but that the consignee does not thereby obtain any right to the property, as against a *bona fide* pledge for value of the bill of lading made prior to the delivery of the property to the consignee (*Marine Bank of Chicago v. Wright*, 6 *Albany L. J.*, 241).

The Superior Court of the city of New York has held that the cashier of a bank having the general charge and management of the business of the bank, by permission of the directors has the authority to transfer to another bank, as security for a loan, notes and drafts discounted by the bank; and that the bank to whom such transfer is made has the right to collect such notes and bills, and the acceptors and indorsors cannot set up the defense of want of title. And it was further decided, that if the loan was made in good faith to the bank, the right of recovery on the notes and drafts is not affected by the fact that the cashier gave his individual note, payable to himself as cashier, for the amount of the loan; and that the fact that the cashier misapplies the money so loaned to his own private purposes will not invalidate the contract, nor prevent the lending bank from collecting the securities (*City Bank v. Perkins*, 4 *Bosw. R.*, 420).

Under an arrangement between the Bank of Pennsylvania and certain other city banks, the bank delivered to them notes and bills of exchange to about the sum of \$800,000 as collateral security, on condition that the other banks should advance to the Bank of Pennsylvania \$600,000 by redeeming its notes. The Supreme Court of the State of Pennsylvania held that this transaction was a pledge, and that the arrangement was not equivalent to an assignment for the benefit of creditors under the act of 1818, and was not, therefore, void because unrecorded (*Griffin v. Rogers*, 38 *Penn. R.*, 382).

The Supreme Court of Michigan has held that a writing given by a debtor to his surety, providing that, on the failure of the debtor to pay within thirty days, the said surety might take immediate possession of the goods, etc., in possession of the debtor in the store and premises occupied by him, and out of the same sell so much as would pay the debt and a reasonable compensation for his

services and redeliver the balance to the debtor, is not a pledge, because no possession was given with it; that it is a mere naked power, not coupled with any present interest, and cannot operate to give the surety any rights in the property itself until reduced to possession. And, therefore, it was held that the lien of an attachment, levied before possession taken under such instrument, must prevail over it (*Holmes v. Hall*, 8 *Mich. R.*, 66).

The Supreme Judicial Court of Massachusetts has held that one who has signed a note at the request of another, and received shares in a corporation as security, may bring an action on an agreement of the person at whose request the note is signed "to pay said note, and receive said shares in case the payee fail so to do," without offering to transfer the shares to that person (*Taylor v. Cheever*, 6 *Gray's R.*, 146).

The Supreme Court of Pennsylvania has held that a chose, which is transferred as collateral security, is put under the dominion of the creditor to make his claim out of it, and is not, in the nature or subject to the incidents of a pawn or pledge (*Chambersburg Ins. Co. v. Smith*, 11 *Penn. R.*, 120).

The Supreme Court of Indiana has held that the holder of negotiable notes as collateral security for the debt of the payee is a holder for value, and may recover thereon against the maker, although he has paid the note to the payee without notice of the indorsement. But in such case he will be entitled to recover only the amount for which he holds the note as collateral security (*Valette v. Mason*, 1 *Smith's R.*, 89). And the same court held, where a judgment debtor deposited with the judgment creditor's attorney certain claims as security, taking receipts therefor, in which the attorney engaged to apply so much of the proceeds as he should be able to collect to the payment of the judgment in a suit in chancery by the debtor, that he was not entitled to a credit for said claims until they were collected, unless they had been lost or had remained uncollected through the creditor's negligence. The court held, also, that had the receipts purported to have been for actual payments, an allegation in the answer that they were for claims deposited as security, etc., would have required proof (*Kiser v. Ruddick*, 8 *Blackf. R.*, 382).

The courts have often held that a bill of sale, absolute on its face, may be shown to have been intended as a mortgage or a pledge by other writings and acts of the parties, and even by parol evi-

dence, and shall, therefore, be so deemed and treated. In such case, if the goods are delivered into the possession of the creditor, it will be regarded as a pledge, otherwise a mortgage (*Vide Dabney v. Green*, 4 *Har. & McHen. R.*, 101; *Ross v. Norvell*, 1 *Wash. R.*, 14; *Brogden v. Walker*, 2 *Har. & John. R.*, 285; *Reed v. Jewell*, 5 *Greenl. R.*, 97; *Walker v. Staples*, 5 *Allen's R.*, 34).

The Supreme Court of Maine decided at an early day that the payee of a negotiable note, who has indorsed it in blank and delivered it in pledge to another as collateral security for his own debt, may still negotiate it to a third person, who may maintain an action on it, in his own name as indorsee, if the pawnee's lien be discharged before judgment (*Fisher v. Bradford*, 7 *Greenl. R.*, 28).

A case decided by the English Court of Common Pleas, in 1862, involves some interesting questions in respect to a pledge, and is worth noting. The case was this: The plaintiff, Martin, being indebted to one Bowers in the sum of forty pounds, entered into an agreement with him, whereby he agreed that Bowers should have his horse, van, cart and two sets of harness "for what he owed him;" and by the memorandum it was further agreed that Bowers should keep the articles mentioned until the plaintiff paid him the forty pounds; and the memorandum concluded thus: "The said Bowers has received into his possession said horse, van, cart and two sets of harness, this 24th December, 1860."

Bowers received into his actual possession the horse and van, and one set of harness; but, having no place to put them in, he left the cart and the other set of harness with the plaintiff, with an understanding that he was to take them whenever he pleased. Bowers having become insolvent, the plaintiff got back the horse, van and set of harness; but Bowers' assignee seized the whole of the things mentioned in the memorandum, and caused them to be sold by the defendant, an auctioneer. The court held, that being the only question raised at the trial, that there had been a sufficient delivery of the goods to Bowers to vest the property in him, subject to the right of the pawnor to redeem; and that, consequently, the plaintiff was not entitled to recover. Although this was the result of the case, several questions of importance were passed upon and settled by the court in respect to the contract of pledge, not shown by the points, involved in the final result.

Erle, C. J., in his opinion, said: "The effect of this arrangement was, that the goods were handed to Bowers as a pledge. Bowers stood in the position of a pawnee. Now, I take the law to be that, to constitute a valid pledge, there must be a delivery of the article, either actual or constructive, to the pawnee; and inasmuch as the memorandum purported to assign the property to Bowers, and as the horse and cart remained in the stable of Martin, the question is whether there has been a valid pledge here. The evidence on this point was that Bowers, having no stable, requested Martin to allow the cart and harness to remain in his. In the written agreement the articles are stated to be in the possession of Bowers. Possession is an equivocal term; it may mean either actual, manual possession, or the mere right of possession. The question is whether, as between these parties, the words used constitute the premises of Martin the premises of Bowers for this purpose. I am clearly of opinion that the intention of the parties will be carried out by holding them to be so. It has, over and over again, been decided that the words of an agreement are to have effect according to the mind and intention of the parties. Thus, a delivery of goods in satisfaction of a debt has been held to amount to payment (*See Carman v. Wood*, 2 *M. and W.*, 465). So, where goods have been purchased and left in the possession of the vendor, for a special purpose of the vendee, it has been held to amount to a delivery (*Elmore v. Stone*, 1 *Taunt.*, 488). So, where a horse was sold, but left in the stable of the seller, being only removed to another stall, that was held to amount, as between the buyer and the seller, to a delivery. And in many instances the warehouse of the vendor has been held to be the warehouse of the purchaser, in order to carry out the intention of the parties. I therefore think there was, in this case, a sufficient delivery of those articles to the pawnee."

The other three judges who sat in the case concurred in the opinion of the chief justice. Willes, J., incidently declared that it had been held that the debt may be taken into consideration in mitigation of damages in an action for converting the pledge; that is to say, where the pledgee illegally disposes of the pledge, or otherwise converts it, in an action against him by the pledgor, the pledgor can only recover the value of the pledge, less the debt for which it was held in security.

The question whether the pawnee may sell the pledge, where

no day has been fixed for the payment of the sum for which the chattel is impignorated, was touched upon, but not definitely decided. Willes, J., said: "As to the right of the pawnee to sell the pledge, whenever that question comes to be decided, it will be necessary to refer to the civil law as stated in Mackeldey's *Systema Juris Romani*, title *Pledge*, from which, probably, Mr. Smith, who was well acquainted with the Roman laws, drew what is stated in the note referred to, and for the application of which to the laws of England the case of *Pothonier v. Dawson*, *Holt*, 383, is an authority. It may be, on examination, that Mr. Smith is right. I do not mean to express any opinion; but I think it right to say thus much" (*Martin v. Reid*, 11 *Com. Bench R.*, *N. S.*, 30; *S. C.*, 103 *Eng. C. L. R.*, 730).

In *Pothonier v. Dawson*, referred to, it was laid down by Gibbs, C. J., that if goods are deposited as a security for a loan of money, such deposit constitutes more than the right of *lien*; and it is to be inferred that the contract between the parties is that, if the borrower do not repay the advance, the lender shall be at liberty to reimburse himself by the sale of the deposit.

In the notes to *Coggs v. Bernard* (1 *Smith's Leading Cases*, 3d ed., 171), it is said: "A *pawn* differs, on the one hand, from a *lien*, which conveys no right to sell whatever, but only a right to retain until the debt, in respect of which the lien was created, has been satisfied; and, on the other hand, from a *mortgage*, which conveys the entire property of the thing mortgaged to the mortgagee conditionally, so that when the condition is broken the property remains absolutely in the mortgagee. Whereas, a *pawn* never conveys the general property to the pawnee, but only a special property in the thing pawned; and the effect of a default in payment of the debt by the pawnor is not to vest the entire property of the thing pledged in the pawnee, but to give him a power to dispose of it, accounting for the surplus; which power, if he neglect to use, the general property of the thing pawned continues in the pawnor, who has a right at any time to redeem it." But these questions have all been discussed in the proper place, and need not be dwelt upon here.

It may not be amiss in this chapter to make a brief reference to a case lately decided by the Supreme Court of Indiana, involving the contract of pledge, which contained special provisions. The doctrine of the case is thus expressed: Where a person, being

indebted to another on account, deposited with the latter as collateral security for such indebtedness a note and a mortgage to secure the same, executed to the pledgor by a third person, the deposit being made upon the express condition that said note and mortgage should not be sued upon or foreclosed until every legal effort to collect said indebtedness had been made by the pledgee, who also agreed to return the note and mortgage upon payment of said indebtedness; in a suit on said note by the pledgee against the maker, the pledgor being made a defendant to answer as to his alleged assignment by delivery, an answer setting forth these facts, and alleging that the pledgor at the time of said deposit, and ever since, had owned property sufficient to pay said indebtedness, and out of which the same might have been made, but that no effort had ever been made to collect said indebtedness, presented a good defense for all the defendants (*Barr v. Kane*, 32 Ind. R.; and *vide* 3 Albany Law Journal, 216).

And it may be added that where securities are pledged by a debtor, to his creditor, as collateral security for a specific debt, the creditor in an action against him for the conversion of the securities cannot set off his general demand against the plaintiff (*Lane v. Bailey*, 47 Barb. R., 395).

CHAPTER LII.

STATUTORY PROVISIONS IN RESPECT TO THE SUBJECT OF PAWNS OR PLEDGES—THE ENGLISH PAWNBROKERS' ACT—LAWS OF NEW YORK RELATING TO PLEDGES AND THE BUSINESS OF PAWNBROKING.

THE most of the rules and principles applicable to pledges or pawns, which have been considered in the previous chapters, are those which are settled by the common law, unaffected by legislative enactment. There are some instances where the common law has been re-enacted or modified by the legislature of the State, and it is proposed to note these instances in this chapter.

And in the first place it may not be amiss to refer to some points which have been settled under the pawnbrokers' act of England, being the 39 and 40 Geo. III, ch. 99. By the second section of this act it is provided that all persons exercising the trade of a pawnbroker shall be entitled to charge interest at cer-

tain rates (specifying the same), and that such interest shall be paid, in addition to the principal, before the pawnbroker shall be obliged to re-deliver the pawn. So long as the usury laws were in force in the kingdom, no person was allowed to charge a higher rate of interest than five per cent, unless specially authorized by statute. But these laws have been repealed, and now, in contracts generally, where both parties act *bona fide* and without fraud, any rate of interest may be recovered for which the parties stipulate. It has been decided, however, that pawnbrokers, *as such*, are not entitled to the benefit of the repeal of these usury laws, but that they must still regulate their charges for interest according to the pawnbrokers' act. But when not acting as pawnbrokers, they are not bound by the restrictions of the act; they must be acting *as* pawnbrokers, in order to come under the regulations of the act (*Pennell v. Attenborough*, 4 *Queen's Bench R.*, 868; *S. C.*, 5 *Burn's Justice*, 474).

Connected with the right to charge interest, by pawnbrokers, are certain liabilities which, on account of the decisions under the act, may properly be noticed. The fourth section of the act makes it imperative on pawnbrokers to give farthings in change, in all cases where the sum payable on redemption, either as interest or part principal and part interest, "shall amount to a total sum of which the piece of money of the lowest denomination shall be one farthing;" and also in cases where the person desirous to redeem cannot produce a farthing, but tenders a halfpenny. In the latter case, the pawnbroker must either produce a farthing in change, or wholly abate the farthing from his demand. And the fifth section provides that where the application to redeem is made within seven days of the expiration of the first calendar month from the time of making the pledge, the pawnor may redeem without paying any interest for those seven days; if the application is made after seven but not after fourteen days, interest shall be charged for a month and a half; but after fourteen days, the pawnbroker may charge interest for the whole of the second month; and the like regulations shall apply to every subsequent calendar month wherein application shall be made for redeeming goods pawned.

Upon the construction of these clauses of the act, it has been decided that where the interest payable under the act to a pawnbroker, on a loan for a month, is a sum which is not an exact num

ber of farthings, the pawnbroker, even if entitled to receive one penny per month on account of the necessity of the case, is not at liberty, on a loan for a longer period, to treat the contract as a monthly contract, taking upon each month the benefit of the fraction of a farthing, where there would no longer be any difficulty in paying him at the exact rate of twenty per cent (*Regina v. Goodburn*, 8 *Adolph. & Ell. R.*, 508; *S. C.*, 3 *Nev. & Per. R.*, 468).

In the case of *Regina v. Goodburn*, the transaction was one in which the loan was four shillings. The monthly interest was four-fifths of a penny, or one penny for one month. The pledge was redeemed in eleven months and a half, and the defendant claimed eleven and a halfpence. But the court held that he had no right to make monthly rests in this manner, and that the utmost he could claim was nine and one-fourth pence. It was made a question in the case, but not decided, whether, where the exact sum due to the pawnbroker for interest would involve a fractional part of a farthing, he is, or is not, entitled to the farthing. On this point it may be stated, however, that the Court of Common Pleas has held that a poor-rate overseer was not entitled to collect more than was actually due; and Willes, J., cited *Baxter v. Faulam* (*Wilson's R.*, 129), as an authority for holding that where an amount comes to something less than any known coin, a ratepayer cannot be called upon to pay it (*Morton v. Bramner*, 8 *Com. Bench R.*, *N. S.*, 791).

The courts have declared that the intention of the statute was not merely to grant to the pawnbroking trade a dispensation from the usury laws, where they existed, and that therefore its effect was to render the taking of a higher rate of interest than that fixed by the statute an offense cognizable by a justice of the peace on summary information. Hence it follows that, as no penalty is given by the second or third sections, taking a larger sum than the act permits is an offense which comes under the general powers given by the twenty-sixth section for punishing those who "in anywise offend," where no particular forfeiture or penalty is elsewhere provided or imposed.

Lord Ellenborough, C. J., observed: "It is prohibited by the act to take more than the stipulated rate of profit; and therefore the taking more is an offense against the act; and as no particular penalty is provided for that transgression, it falls within the

general words of the twenty-sixth clause" (*The King v. Beard*, 12 *East's R.*, 633).

On the principle which renders void all contracts in which the parties mutually agree that one of them shall do an act contrary to the express provisions of a public statute, it has been decided that if a pawnbroker upon one contract advance more than ten pounds, and pretend to divide the same as if there were several different loans, and for that purpose give several tickets dated on different days, it is for the jury to say whether the transaction is a mere contrivance to conceal usury, and if they so find, the whole is illegal and void (*Cowie v. Harris*, 1 *Moody & Malkin's R.*, 141). The judgment in this case did not proceed on any matter peculiar to the trade, but on the general rule of the common law, *ex dolo malo non oritur actio*. That is to say, the judgment was based upon principles laid down in a case decided some years ago by the Supreme Court of the United States, in which it was declared that "the object of all law is to repress vice and to promote the general welfare of society, and it does not give its assistance to a person to enforce a demand originating in his breach or violation of its principles and enactments. Contracts in violation of statutes are void, and they are so whether the consideration to be performed, or the act to be done, be a violation of the statute or not" (*Harris v. Runnals*, 12 *How. U. S. R.*, 83).

In an action of trover for certain watches which came before the English Court of Exchequer, the plea was that the defendant was a pawnbroker, and that the goods were deposited for money advanced, which had not been repaid. Replication, that, before they were so pledged, it was corruptly agreed that the defendant should lend the plaintiffs a sum exceeding ten pounds, to wit, seventy-seven pounds, and that the defendant should forbear and give day of payment thereof to the plaintiff *until the expiration of the year next after such loan and advancement*, that plaintiff should give more than lawful interest, * * * whereby the agreement was wholly void. It was proved at the trial that the watches were deposited, but that no agreement was made as to the time they should remain in pledge. On application the judge amended the record by inserting, after "such loan," the words *redeemable in the meantime*. The plaintiff had a verdict, and on motion to enter a nonsuit the court held that this was a contract within the pawnbrokers' act; and that it was to be assumed, from the circumstances

that the plaintiff had dealt with the defendant *in the character of and upon the usual terms of dealing with* a pawnbroker (*Nickisson v. Trotter*, 3 *Mees. & Welsb. R.*, 30).

Another case, hereinbefore referred to upon another point, went off on the same principle. In that case the defendant, a pawnbroker, had advanced £200 to a trader on a deposit of silks, and had entered the transaction in his books as several advances, each of less than ten pounds. The trader became bankrupt; his assignees sued the defendant in trover, and obtained a verdict. Tindal, C. J., who tried the cause, directed the jury to find whether the goods had been deposited on a contract to pay more than five per cent interest. They found the question in the affirmative, and the plaintiff, consequently, had a verdict. On motion for a new trial, Park, J., referred to the case of *Cowie v. Harris* (1 *Mood. & Malk. R.*, 141), and citing Lord Tenterden's ruling in that case, said that it was a question for the jury whether the whole were really one transaction and a mere contrivance for obtaining the higher interest on the whole sum, in which case it was void, or whether the advances were really distinct. The court unanimously held the ruling to be right, and refused to disturb the verdict (*Tregoning v. Attenborough*, 7 *Bing. R.*, 97). And in a case in the Court of Chancery of England, it was said by Cottenham, Lord Chancellor, that "there is a fraud in advancing money at different times," referring, doubtless, to loans under peculiar circumstances, like those in the case in 7 Bingham (*Fitch v. Rockfort*, 1 *Hall & Twells' R.*, 255; *S. C.*, 1 *Mac. & Gord. R.*, 184; *S. C.*, 13 *Jur.*, 351).

The practical effect of the statutory restrictions on a pawnbroker's profits has, however, been greatly narrowed by the doctrine hereinbefore referred to, that they only affect him when dealing in his business as a pawnbroker. This was authoritatively settled in the case referred to where the assignees of a bankrupt sued to recover different articles which the bankrupt had pledged with the defendant, a pawnbroker. One such transaction took place on April 8th, 1841, and an entry had been made in a book belonging to the defendant (but not kept according to the requirements of the pawnbrokers' act) to the following effect: To be held by him as a security for £115 this day lent, with interest thereon from the date hereof, at the rate of fifteen per cent per annum until payment; and in default of payment on the 18th of October then

text; I do hereby authorize the said R. Attenborough to sell and dispose of such articles, either by public sale or private contract, and to repay himself thereout." The defendant had made no entry of this transaction, as required by the statute, nor did he give the bankrupt any duplicate; and the question raised was, whether he was acting as a pawnbroker when he advanced the money. The court considered that by the statute 39 and 40 Geo. III, ch. 99, sec. 2, the pawnbroker was allowed to take twenty per cent on goods pawned, but it did not mention any case where the sum should be above ten pounds, apparently assuming that no sum above that amount would ever be borrowed of a pawnbroker. Looking at 1 and 3 Vict., ch. 37, the court considered that usurious loans of his description were lawful, as the statute 39 and 40 Geo. III, ch. 99, only applied to loans not exceeding ten pounds. Judgment accordingly was for the defendant (*Pennell v. Attenborough*, 4 *Queen's Bench R.*, 868; *S. C.*, 5 *Burn's Justice*, 474).

To the same effect is the decision of the Court of Chancery, made some years later than the case of *Pennell v. Attenborough*, and which has been before referred to. The Vice-Chancellor of England had granted an injunction restraining the defendant from selling jewelry deposited with him as security for £1,383. The property had been pledged by the plaintiff, a married woman, and the plaintiff having paid all interest due up to a certain time, signed several contract notes setting forth the terms of the deposit, and duplicate copies of such contracts were given to her by the defendant. These contracts stipulated for interest at the rate of threepence per one pound sterling per month. Such interest, after the first month, to be calculated half-monthly, with power to the defendant to sell twelve months after date, and to account for surplus or claim for deficiency, as the case might be, if demanded within three years; in fact, embodying in this contract nearly all the special conditions peculiar to a transaction under the Pawnbrokers' Act. The amount mentioned in each contract was above ten pounds; and the contention was that the transaction was an ordinary pawnbroking contract, and, therefore, void. But Lordottenham, on appeal, reversed the vice-chancellor's decision, and dissolved the injunction without calling on the appellant's counsel to reply. His lordship held that pawnbrokers were under no disabilities, except that they were bound by the act if they advanced sums under ten pounds. Therefore, transactions above ten pounds

were to be looked at just as if the Pawnbrokers' Act did not exist at all. The 2 and 3 Vict., ch. 37, provides that, *as to all loans* under ten pounds, pawnbrokers shall be confined to their own act; and as the repeal of the usury laws had left every one free, with respect to loans above ten pounds, and there was nothing in the act to incapacitate pawnbrokers, the act 39 and 40 Geo. III, ch. 99, had nothing whatever to do with the transaction, which was just as binding as if the pawnee were not a pawnbroker. A pawnbroker, like every one else, may avail himself of the provisions of 2 and 3 Vict., ch. 37, for the purpose of obtaining a higher rate of interest than five per cent; and a contract for that purpose, made upon the deposit of goods, will not be invalid merely because it contains stipulations usual in an ordinary pawnbroking transaction (*Fitch v. Rochfort*, 13 Jur., 351; *S. C.*, 1 Mac. and Gord. R., 184; *S. C.*, 1 Hall and Twells' R., 255; and *vide*, also, *Turquand v. Mosedon*, 7 Mees. and Welsb. R., 504).

So generally is the doctrine laid down by Lord Cottenham now recognized and acted upon, that the pawnbrokers of England in large business constantly make advances, both above and below £10; the only practical difference being that they do not give duplicates for goods pledged for sums above the limit fixed by statute. It appears, however, that by the act abolishing the English usury laws, it is expressly provided that the rates of interest allowed by law to be taken by pawnbrokers are to remain unaffected by the repeal (2 and 3 Vict., ch. 37, § 3; 17 and 18 Vict., ch. 90, § 4).

As a question of practice, it has been decided that where an endeavor is made to avoid a pawnbroking contract, on the ground that it is forbidden by the statute, it is not sufficient to aver that it was made "corruptly and against the form of the statute agreed, etc." The illegality must be stated with certainty; and if it depends on a particular statute, that statute must be pleaded (*Turquand v. Mosedon*, *supra*.)

The courts hold that the duplicate or declaration given to the pawnor, under the pawnbrokers' act, must generally be produced when the pawnor applies to redeem the goods; but when goods have been stolen, or otherwise unlawfully obtained, and then pawned, the pawnbroker has no right to insist upon the production of the duplicate, nor is the real owner bound to produce it

(*Peet v. Baxter*, 1 *Stark. R.*, 472; *Packer v. Gillies*, 2 *Camp. R.*, 336).

As most of the American States have laws in respect to the business of pawnbroking, some of which are, doubtless, similar to the English pawnbrokers' act, these points decided under the provisions of the latter act may be useful for reference in this country, and applicable to cases arising here. In the State of New York there seems to be one general enactment in respect to pawnbrokers and property pledged with pawnbrokers; and there have been special laws passed relating to pledges or pawns, which are still in force.

* In 1817 an act was passed concerning Indians residing within this State, which makes it unlawful for any white person, under any pretense, or on any account whatever, to receive from any Indian, residing on any tract of land belonging to or occupied by the Mohekonnic or Stockbridge Indians, or on the reservation lands of the Oneida or Brothertown Indians, any article or articles whatsoever, by way of pawn or pledge; and provides that every person who shall receive such pawn or pledge shall forfeit the sum of twenty-five dollars, to be recovered in an action of debt, in the name of the Indian from whom he shall have received such pawn or pledge, in any court having cognizance thereof, with costs. And that every such pledge or pawn, or the value thereof, shall also be recoverable, with costs, by the Indian from whom the same shall have been received, in an action of replevin or trover (*Laws of 1817; ch. 143; 4 Stat. at Large, 359*).

By an act of the legislature, passed in 1847, it is provided that any person who shall receive from any Indian of the Seneca nation, either absolutely in payment or exchange, or in pawn or pledge, for the payment in whole or in part for any spirituous liquor or intoxicating drink, sold or delivered, or to be sold or delivered to such Indian, or to any other Indian of the said nation, any blanket, wearing apparel, implement or other goods or chattels, shall forfeit ten times the value of the article so received, to be sued for and recovered with costs by the attorney of the said Seneca nation and in their name; and the amount recovered and collected shall be paid over for the benefit of the said Seneca nation; and any Indian of the said Seneca nation is declared to be a competent witness to prove the receipt of such goods or chattels, or the sale or gift of any intoxicating drink to any Indian of the said nation.

And it is further provided that any article or property sold, exchanged, or pawned or pledged as aforesaid, for spirituous liquor or any intoxicating drink, may be reclaimed and recovered, by the Indian so selling or pledging the same, from the person to whom the same shall have been sold or pledged, or from any other person to whom the same may have been delivered, assigned, sold or transferred; and for the recovery of the same such Indian may maintain an action in any court having cognizance thereof; and in case such action shall not be brought or commenced within twenty days from the sale or pledge of such article or property, then it is made lawful for the peacemakers of the reservation to which such Indian belonged, if any such peacemakers shall be chosen according to the provisions of the act, to demand, sue for and recover the article or property so sold or pledged, in any court having cognizance thereof, in and by their name of office; in which action the Indian who made such sale or pledge is made a competent witness for the plaintiffs (*Laws of 1845, ch. 150, § 4; 4 Stat. at Large, 378*).

In 1849, the legislature of the State passed another act for the benefit of Indians, by which the provisions of the act of 1845, relative to pawns or pledges made by Indians for liquor, were extended to any and all Indians residing within the State, irrespective of the tribe (*Laws of 1849, ch. 420, § 2; 4 Stat. at Large, 392*).

And by an act previously passed in 1813, it was enacted that no pawn taken of any Indian within the State, for any spirituous liquor, shall be retained by the person to whom such pawn shall be delivered; but the thing so pawned may be sued for and recovered, with costs of suit, by the Indian who may have deposited the same, before any court having cognizance thereof (*Laws of 1813, ch. 29; 4 Stat. at Large, 342*).

By the the act of the legislature passed in April, 1842, to extend the exemption of household furniture and working tools from distress for rent and sale, under execution, it is provided that every assignment, sale or *pledge* of articles which are exempt by law from execution, and every levy or sale of such articles or property by virtue of an execution, by consent of the defendant therein, shall be void, where the consideration, or any part thereof, for which such assignment, sale or *pledge* was made, or for the debt on which judgment was rendered in any court, and on which such execution was issued, was for the sale of intoxicating liquors;

and in any action commenced for the recovery of the value of the property sold as aforesaid, the person for whose benefit such sale or transfer was made may be called and examined as a witness as to the fact of the sale of intoxicating liquors so made, in the same manner and subject to the same penalties as if called in any other case (*Laws of 1842, ch. 157, § 3; 4 Stat. at Large, 626, 627*).

In respect to the business of pawnbroking in the State, it is enacted that no person shall carry on the business of a pawnbroker, by receiving goods in pledge for loans at any rate of interest above that allowed by law, except in those cities where by their charters the corporations have the power of licensing such pawnbrokers. A violation of this provision of the statute is deemed to be a misdemeanor.

The statute further provides that whenever any person shall make oath, before any justice of the peace, police justice or assistant justice, that any property belonging to him has been embezzled or taken without his consent, and that he has reason to believe and suspect, and does suspect, that such property has been pledged with any pawnbroker, such justice, if satisfied of the correctness of such suspicions, shall issue his warrant, directed to any constable of the city or place, commanding him to search for the property so alleged to have been embezzled or taken, and to seize and bring the same before such justice. And the constable to whom any such warrant shall be directed and delivered is declared to have the same power to execute the same, and he must proceed in the same manner, as in the case of a search warrant issued upon a charge of larceny.

It is further provided by the statute that, upon any property so seized by virtue of such warrant being brought before the magistrate who issued the same, he shall cause such property to be delivered to the person so claiming to be the owner thereof, on whose application the warrant was issued, on his executing a bond as specified by the statute; and if such bond be not executed within twenty-four hours, the justice is required to cause the property to be delivered to the person from whose possession it was taken. The bond is required to be in a penal sum equal to double the value of the property claimed, with such surety as the justice shall approve, to the person from whose possession the property was taken, with a condition that the person so claiming the same will on demand pay all damages that shall be recovered

against him in any suit to be brought within thirty days from the date of such bond, by the pawnbroker from whose possession the said property was taken (1 *R. S.*, *part 1, ch. 20, tit. 19, art. 3*, §§ 9-13; 1 *Stat. at Large*, 659, 660).

These seem to be all of the statutes of a general nature, or of a general application in the State, now in force relating to pledges or pawns, pawnbrokers, or the business of pawnbroking; but in several of the larger cities, like New York, Brooklyn, Albany, etc., the charters contain provisions for the licensing of pawnbrokers, in which cases the business of pawnbroking is usually regulated by the ordinances of the municipal corporation.

CHAPTER LIII.

STATUTORY PROVISIONS IN RESPECT TO THE SUBJECT OF PAWNS OR PLEDGES — LAWS OF THE NEW ENGLAND STATES UPON THE SUBJECT — DECISIONS OF THE COURTS UNDER THE STATUTES.

IN the State of Maine, pawnbrokers are to be licensed by the municipal officers of the towns, and must be persons of good moral character, and their licenses must be renewed yearly, and they are subject to a penalty not exceeding \$100 for doing business without a license.

Every pawnbroker is required to keep a book, in which he must enter the date, duration, amount and rate of interest of every loan made by him, an accurate account and description of the property pawned, and the name and residence of the pawnor, and, at the same time, deliver to said pawnor a written memorandum signed by him, containing the substance of the entry, and, at all reasonable times, submit said book to the inspection of any officer authorized to grant the license; and for every violation of this provision he will forfeit twenty dollars.

No pawnbroker in the State must, directly or indirectly, receive any rate of interest greater than twenty-five per cent a year on a loan not exceeding twenty-five dollars, nor more than six per cent on a larger loan made upon property pawned, under a penalty of \$100 for each offense.

No pawnbroker can legally sell any property pawned until it has remained in his possession three months after the expiration

of the time for which it was pawned. And all such sales are required to be at public auction by a licensed auctioneer; and after notice of the time and place of sale, the name of the auctioneer and a description of the property to be sold are published in a newspaper in the town where the property is pawned, if any; and, if not, posted in two public places therein at least two weeks before the sale. And all sales, otherwise made, are declared void; and the pawnbroker undertaking to make the same will forfeit twenty dollars for every offense.

After deducting from the proceeds of any sale the amount of the loan, the interest then due and the proportional part of the expenses of the sale, the pawnbroker is required to pay the balance to the person entitled to redeem such property, if no sale had been made; and if not so paid on demand, he will forfeit double the amount so retained; one-half to the pawnor and the other half to the use of the State (*Rev. Stat. of 1871, ch. 35, §§ 1-5*).

The Supreme Court of Maine has held that if one pledges, as collateral, a demand on which interest is accruing at stated periods, some of which occur before his debt so secured becomes due, such pledge necessarily implies authority to the pledgee to collect and receive the interest as it becomes payable, and hold it on the same terms as the demand itself, especially if the collateral be a bond with interest coupons attached, which the pledgor does not cut off before the bond is pledged (*Androscoggin R. R. Co. v. Auburn Bank*, 48 *Maine R.*, 335).

A case came before the Supreme Court several years ago, in which it appeared that the principal debtor in a promissory note conveyed to his surety certain timber, by writing, in these terms: "In consideration that D. has become my surety to W. for \$3,000, I hereby assign to him all the timber," etc. The surety also borrowed money of the same lender; and afterward, by indorsement, assigned all his interest in that instrument to O., whom he subsequently directed to apply the proceeds of the timber, first, to the last mentioned debt of his own, and the balance to the debt of \$3,000 due from his own assignor. The court held that the conveyance to D. was not absolute, but a pledge and trust to pay the debt for which he had become surety, and that he had no right to appropriate the proceeds to his own debt (*Ware v. Otis*, 8 *Maine R.*, 387).

These authorities do not involve the construction of any of the provisions of the statutes of the State upon the subject of pledges; but they are, nevertheless, of interest, as giving a construction to the particular transactions which came before the court for adjudication.

By the statutes of New Hampshire, no mortgagee of personal property is permitted to sell or pledge any such property by him mortgaged, without the consent of the mortgagor in writing upon the mortgage, and on the margin of the record thereof, in the office where it is recorded, upon pain of being fined double the value of the property pledged (*Gen. Stat.*, 1867, *ch.* 123, §§ 13, 15).

It is also provided by statute that, where no time is limited for the payment of the debt secured by a pledge or redemption of the property pledged, the pledgee may sell the same, or so much thereof as is needful, at auction, notice of the sale being given by posting notice thereof in two or more public places in the town where such property is situated, and if the value of the property exceeds \$100, by publishing notice thereof three weeks at least before the sale. A notice of such sale is also required to be served on the pledgor or general owner, if resident of the county, the same number of days before the sale, stating in writing the time and place of sale, the property to be sold, and the amount of the lien thereon. The balance of the proceeds of the sale, if any, after payment of the amount of the pledge and the reasonable expenses incident to such sale, is required to be paid to the pledgor on demand (*Gen. Stat.*, 1867, *ch.* 125, §§ 3-7).

Personal property pledged in New Hampshire may be attached or taken on execution against the pledgor, the attaching officer or execution creditor paying or tendering to the pledgee the amount of his claim on the property (*Gen. Stat.*, 1867, *ch.* 205, § 17; *ch.* 217, § 3).

A case came before the Supreme Court of the State, in which it appeared that two tables which were in a shed attached to the defendant's store were pledged by the owner to the plaintiff, both parties to the pledge being present. The plaintiff moved one of the tables nearer to the other. The parties then left the shed without notifying the defendant. The defendant afterward converted the tables to his own use. The court held that the plaintiff's possession was sufficient as against the defendant (*Tibbets v Flanders*, 18 *N. H. R.*, 290).

The Supreme Court has held that a pledgee of chattels summoned as a trustee is entitled to a fair compensation for expenses attending the keeping, and has a lien therefor against the creditor as well as the pledgor (*Hills v. Smith*, 28 N. H. R., 369). And the same court has held that a pledgee of personal property is answerable in a trustee process only for the balance which remains in his hands after satisfying his legal and equitable claims. And it was further held that the power to sell a pledge is not affected by a trustee suit (*Chapman v. Gale*, 32 N. H. R., 141).

The Supreme Court has also held that the payee of a negotiable promissory note, secured by a pledge, may transfer the pledge with the note, and will not be liable in trover for a subsequent conversion by the assignee (*Goss v. Emerson*, 23 N. H. R., 38; and *vide Green v. Graham*, 46 *ib.*, 169; *Bailey v. Colby*, 34 *ib.*, 35). And it was also decided by the same court that a pledge is not released by committing the body of the debtor to prison upon an execution for the debt (*Morse v. Woods*, 5 N. H. R., 297). And the same court has also declared, in opposition to the general rule upon the subject, that where one of several joint insolvent debtors pledges to the creditor the note of an insolvent person as collateral security without any restriction, the creditor has an implied authority to release the maker upon his paying a part of the sum due on the note (*Exeter Bank v. Gordon*, 8 N. H. R., 66, 82).

In the State of Vermont the only statutory provision found, upon the subject of pledges, is the one which declares that personal property, held by any person as pledgee, may be attached and levied upon as the property of the pledgor, subject to the right, title and interest of such pledgee (*Gen. Stat.*, 1870, *tit.* 15, *ch.* 33, § 31).

In the State of Massachusetts the mayor and aldermen, or selectmen of any city or town, which has adopted by-laws therefor, may license suitable persons to carry on the business of pawn-brokers within their respective cities and towns. The license must designate the place where the business is to be carried on, contain such conditions and restrictions as may be prescribed by such by-laws, and will continue in force one year, unless sooner revoked; and any person carrying on such business without being licensed is subject to a penalty of fifty dollars for each offense (*Gen. Stat.*, *ch.* 88, §§ 28-30).

It is provided by the statutes of Massachusetts that personal

property of a debtor that is subject to a pledge, and of which the debtor has the right of redemption, may be attached and held as if it were unincumbered, provided that the attaching creditor pays or tenders to the pawnee the amount for which the property is so liable within ten days after the same is demanded. And it is made the duty of the pledgee, when demanding payment of the money due to him, to state, in writing, a just and true account of the debt or demand for which the property is liable to him, and deliver it to the attaching creditor or officer. If the same is not paid or tendered to him within ten days thereafter, the attachment will be dissolved, and the property must be restored to him; and the attaching creditor will, moreover, be liable to him for any damages he has sustained by the attachment (*Gen. Stat., ch. 123, §§ 62, 63*).

The statute further provides that the holder of personal property, in pledge for the payment of money or the performance of any other thing, may, after failure to pay or perform, give written notice to the pledgor that he intends to enforce payment or performance by a sale of the pledge; which notice must be served, and, together with an affidavit of service, be recorded in the clerk's office of the city or town where the pledgor resides, in the same manner, and with the like effect, as provided for notices of foreclosure of mortgage. And if the money to be paid, or other thing to be done, is not paid or performed, or tender thereof made, within sixty days after the notice is so recorded, the pledgee may sell the pledge at public auction, and apply the proceeds to the satisfaction of the debt or demand, and the expenses of the notice and sale; and any surplus must be paid to the party entitled thereto on demand. These provisions of the statute, however, do not authorize the pledgee to dispose of the pledge contrary to the terms of the contract under which it is held, nor limit his right to dispose of it in any other manner allowed by the contract or the rules of law (*Gen. Stat., ch. 151, §§ 9-11*).

There is also a provision of the statute which declares that every factor or agent intrusted with the possession of merchandise, or a bill of lading, consigning merchandise to him for the purpose of sale, shall be deemed to be the true owner thereof, so far as to give validity to any *bona fide* contract made by him with any other person for the sale of the whole or of any part of such merchandise. And if any person takes such property as a pledge from

such factor or agent with notice that such factor or agent holds the same simply as factor or agent, then the pledgee will acquire the same interest as though such factor or agent had been the actual owner thereof, provided the pledge was taken in good faith, and with probable cause to believe that the factor or agent had authority to make the pledge, and was not acting fraudulently.

If, however, the merchandise is accepted in deposit or pledge for an antecedent debt due from the factor or agent, the person receiving the same will thereby acquire no other or further right, or interest in, or authority over, or lien upon, the same, than the consignee or grantor might have enforced against the actual owner (*Gen. Stat.*, *ch.* 54, §§ 2, 4, 5).

And there is also a provision of the statute that, in transfers of stock as collateral security, the debt or duty which such transfer is intended to secure shall be substantially described in the deed or instrument of transfer; and, further, that a certificate of stock issued to a pledgee or holder of such collateral security shall express on the face of it that the same is so holden, and the name of the pledgor must be stated therein, who alone is made responsible as a stockholder (*Gen. Stat.*, *ch.* 68, § 12).

No special statutory provision in respect to pawns or pledges is found in the laws of Rhode Island or Connecticut, and hence the subject is controlled by the rules of the common law in those States.

CHAPTER LIV.

STATUTORY PROVISIONS IN RESPECT TO THE SUBJECT OF PAWNS OR PLEDGES—LAWS OF THE TERRITORY OF ARIZONA RELATING TO PLEDGES AND PAWNBROKING—LAWS OF THE SEVERAL STATES UPON THE SUBJECT, EXCEPTING THOSE OF NEW YORK AND THE NEW ENGLAND STATES, WHICH ARE CONSIDERED IN THE TWO PRECEDING CHAPTERS.

In the territory of Arizona, it is provided by statute that every person or firm engaged in the business of pawnbroker or pledgee, or of the purchase or sale of second-hand clothing, wares or merchandise, shall keep a register book, of the size known by stationers as six quarto extra cap, in which shall be made an entry, with ink, in the English language, at the time of loan, pledge or purchase, a

true and accurate account and description of every article of property pledged or purchased, the name and residence of the pledgor or vendor, the date, duration, amount and rate of interest of every loan made, or the date and hour of purchase of any property purchased; and shall, if any loan be made or property pledged, at the time of the loan or pledge, deliver to the pledgor a written or printed memorandum, signed by him, her or them, containing a copy of said entry; and shall in like manner keep an account of all sales made by him, her or them.

The rate of interest or per centage which may be lawfully charged by any pawnbroker or pledgee must not exceed five per cent per month, in advance, on all loans exceeding twenty dollars, which will include all charges for discount, commissions, storage, brokerage, wasting, and all and every charge or charges thereupon, nor can the interest at any time be compounded.

And it is declared that any pawnbroker or pledgee who shall directly or indirectly charge or receive any interest greater than five per cent per month, or by charging commissions, discount, brokerage, storage, wastage, or other charge, or shall attempt to increase said interest, shall forfeit three times the value of the article pledged or to be pledged, to be recovered by the owner or pledgor in a civil action, which may be brought by the party aggrieved.

The statute further provides that no pawnbroker or assignee shall sell or dispose of any article pledged to them and unredeemed until it has remained in his, her or their possession three months after the last day of redemption; and all such sales must be at public auction, upon notice of five days, published in some newspaper printed at the place where the sale takes place; and if no newspaper is there printed, then by printed notices in two public places five days before the sale, giving the place where the article will be sold, and a list of said articles, which sales are required in all cases to take place in the town or city where such articles are pledged.

Upon a sale of any pawn or pledge, the pawnbroker or pledgee may retain from the proceeds of the sale the amount of the loan, the interest thereon at the rate provided, and ten per cent on the loan additional for the expense of the sale, and the balance must be paid to the person entitled to redeem such property; if no sale had been made, and if not so paid on demand, three times the value

thereof will be forfeited, to be recovered by the owner or pledgor in a civil action to be brought by him therefor.

Every pawnbroker, or pledgee, or purchaser or seller of second-hand clothing, etc., is required to exhibit his, her or their register book; and all articles received in pledge or purchased by him, her or them, and his, her or their account of purchases or sale, to any sheriff, constable or police officer possessing the necessary writ or warrant to search for personal property; and the register book must be produced to any sheriff, constable or police officer for inspection, whenever so required by the order of any committing magistrate of the county, which order may be made whenever the magistrate deems it expedient for the purpose of ascertaining the place or concealment of any stolen property.

Every violation of any of the provisions of the statute by any pawnbroker, pledgee, or purchaser or seller of second-hand clothing, etc., is made a misdemeanor, punishable by a fine not less than \$50 nor exceeding \$300, or by imprisonment in the county jail for a term not exceeding six months, or by both such fine and imprisonment. Such fines, when collected, are to be paid into the treasury of the county where collected, to be applied to the support of the public schools of the county (*Comp. Laws of 1864-1871*, ch. 88).

In the State of California the statute requires every person or firm engaged in the business of pawnbroker or pledgee, or of the purchase or sale of second-hand clothing, wares or merchandise, to keep a register book of the size known by stationers as six quarto extra cap, in which shall be made an entry, with ink, in the English language, at the time of loan, pledge or purchase, a true and accurate account and description of every article of property pledged or purchased, the name and residence of the pledgor or vendor; the date, duration, amount and rate of interest of every loan made, or the date and hour of purchase of any property purchased; and if any loan be made or property pledged at the time of the loan or pledge, to deliver to the pledgor a written or printed memorandum, signed by him, her or them, containing a copy of said entry and an account of all sales made by him, her or them, must, in like manner, be kept.

Every pawnbroker, or pledgee, or purchaser or seller of second-hand clothing, etc., is required to exhibit his, her or their register book; and all articles received in pledge or foreclosed by him, her

or them, and his, her or their account of purchases or sales, to any sheriff, constable or police officer possessing the necessary writ or warrant to search for personal property. And it is made the duty of every such pawnbroker, pledgee, purchaser or seller to produce his, her or their register book, for inspection, to any sheriff, constable or police officer, whenever so required by the order of any committing magistrate of the county; and such order may be made by such magistrate whenever he shall deem it expedient for the purpose of ascertaining the place of concealment of any stolen property. And every violation of the statute by any such pawnbroker, pledgee, purchaser or seller is made a misdemeanor, punishable by a fine not less than \$50, nor exceeding \$500, or by imprisonment in the county jail for a term not exceeding six months, or by both such fine and imprisonment (3 *Gen. Laws* 1864-1870, §§ 9077, 9079, *supplement*).

It is further provided by statute that the rate of interest or per centage, which shall be lawfully charged by any pawnbroker or pledgee, shall not exceed four per cent per month, in advance, on all loans exceeding twenty dollars, which shall include all charges for discount, commissions, storage, brokerage, wasting, and all and every charge or charges thereupon; and the interest cannot at any time be compounded. And any such pawnbroker or pledgee who shall violate this provision of the statute will forfeit three times the value of the article pledged, or to be pledged, to be recovered by the owner or pledgor in a civil action which may be brought by the party aggrieved.

No pawnbroker or pledgee can legally sell or dispose of any article pledged to him or her, and unredeemed, until it has remained in his or her possession six months after the last day of redemption; and all such sales are required to be at public auction upon notice of five days, published in some newspaper printed at the place where the sale takes place; and if no newspaper is there printed, then by posting notices in two public places, five days before the sale, giving the place where the article will be sold, and a list of said articles, which sales must, in all cases, take place in the town or city where such articles are pledged. The pawnbroker or pledgee is entitled to retain from the proceeds of any such sale the amount of the loan, the interest due thereon, and four per cent on the loan additional for the expense of the sale, and the surplus, if any, must be paid over to the person entitled

to redeem such property, if no sale had been made, and if not so paid on demand, three times the amount thereof will be forfeited, to be recovered by the owner or pledgor, in a civil action to be brought by him therefor (1 and 2 Gen. Laws, 1850-1864, §§ 4827-4830).

These statutes apply in the ordinary cases of pledge, and in some respects they modify the common law upon the subject.

The Supreme Court has held that the act prohibiting pawnbrokers or pledgees from charging more than four per cent per month on loans made on property pledged as security, is not in violation of section 29, article 1, of the Constitution, which provides that "all laws of a general nature shall have a uniform operation." And it was further held that where a pawnbroker loans money upon property pledged, and the borrower contracts to pay him more than four per cent interest per month, he can recover possession of the property by tendering him the principal and four per cent per month interest (*Jackson v. Shawl*, 29 Cal. R., 267).

The common-law rights of the pledgee, except as modified by the statute, have been expressly recognized by the courts; and it has been held that the common-law right of the pledgee to sell the pledge upon the default of the pledgor, and thereafter bring his action for any balance remaining unsatisfied, is wholly unaffected by chapter 17, title 8 of the practice act of the State. The plaintiff in the case was not a pawnbroker, and the property pledged was sold on due notice, after the maturity of the obligation, and after a demand of the money unpaid, but before the expiration of the six months provided by statute; and the action was brought to recover the balance due over and above what was made by the sale of the pledge (*Mangue v. Haringhi*, 26 Cal. R., 577).

It will be observed that there is a marked similarity between the statute of the Territory of Arizona and that of the State of California upon the subject of pawns, and it is evident that the first was formed from the latter; but the provisions of the two enactments differ in some material respects, and, therefore, it becomes necessary to insert the substance of the statutes of each commonwealth.

There do not seem to be any general statutes upon the subject of pawns or pledges in the States of Delaware or Florida, so that

the common law is in full force in those States. In the State of Georgia they have a statute by which a pledge, or pawn, is defined to be property deposited with another as security for the payment of a debt. Delivery of the property is made essential to this bailment, but promissory notes and evidences of debt may be delivered in pledge. It is declared that delivery of title-deeds creates no pledge.

The statute declares that the receiver in pledge or pawn of promissory notes is such a *bona fide* holder as will protect him under the same circumstances as a purchaser from the equities between the parties, but not from the true owner, if fraudulently transferred, though without notice to him.

The pawnee is authorized by the statute to sell the property received in pledge after the debt becomes due and remains unpaid; but he must always give notice for thirty days to the pawnor of his intention to sell, and the sale must be in public, fairly conducted, and to the highest bidder, unless otherwise provided by contract.

The statute further provides that the pawnee may use the goods pawned, provided the use does not impair their real value. He has a lien on them for the money advanced, though not for other debts due to him. He may retain possession until his lien is satisfied, and has a right of action against any one interfering therewith.

The general property in the goods remains in the pawnor by the express provision of the statute; but the pawnee has a special property for the purposes of the bailment, and it is provided that the death of neither party interferes with their respective interests.

It is further provided that the pawnee may transfer his debt, and with it possession of the thing pawned, and that the purchaser stands precisely in his situation. And property in pawn may be seized and sold under execution against the pawnor, but upon notice by the pawnee to the levying officer; and the court in distributing the proceeds will recognize his lien according to its dignity, and give such direction to the funds as shall protect his legal rights.

The pawnee is bound by statute for ordinary care and diligence, and if the property pledged be promissory notes or other evidences of debt the pawnee must exercise ordinary diligence in collecting and securing the same. The pawnor is required by the statute to pay all necessary expenses and repairs upon the property; but if

he pawn has itself been profitable, or if the pawnee has used it to his own advantage, the pawnor may require him to account for such profit. And all interest of property in pawn belongs to the pawnor, by the provisions of the statute (*Revised Code of 1866, part 2, tit. 3, ch. 7, art. 6, §§ 2110-2119*).

The statute of Georgia makes but little modification of the common law, although in some respects it is slightly changed or more clearly defined.

No statutes exist, of a general nature, in relation to pledges or pawns, in Illinois, Indiana, Iowa or Kentucky, and none in Kansas except that by a general law, the cities of the State may levy and collect a lien for tax on pawnbrokers doing business within their respective limits (*Gen. Stat. of 1868, ch. 18, § 15, sub. 5; and ch. 19, § 30, sub. 4*).

In the State of Louisiana, they have a peculiar statutory policy in respect to the subject of pledges, unlike that which exists in any other of the American States. The statute defines a pledge to be a contract by which one debtor gives something to his creditor as a security for his debt, and the statute makes two kinds of pledge, the pawn and the antichresis. A thing is said to be pawned where a movable thing is given as security, and the antichresis where the security given consists in immovables.

Generally it is declared that every lawful obligation may be enforced by the auxiliary obligation of pledge. If the principal obligation be conditional, that of the pledge is confirmed or extinguished with it. If the obligation is null, so also is the pledge.

The obligation of pledge, annexed to an obligation which is purely natural, is rendered valid only where the latter is confirmed and becomes executory.

Pledge may be given not only for an obligation consisting in money, but also for one having any other object; for example, a surety. Nothing prevents one person from giving a pledge to another for becoming his surety with a third. And it is provided that a person may give a pledge, not only for his own debt, but for that of another also.

A debtor may give in pledge whatever belongs to him; but with regard to those things in which he has an ownership which may be divested, or which is subjected to incumbrance, he cannot confer on the creditor by the pledge any further right than he had himself.

To know whether the thing given in pledge belonged to the

debtor, reference must be had to the time when the pawn was made. If at the time of the contract the debtor had not the ownership of the thing pledged, but has acquired it since, by what title soever, the statute provides that his ownership shall relate back to the time of the contract, and the pledge should stand good.

One person may pledge the property of another, provided it be with the express or tacit consent of the owner. But the statute provides that this tacit consent must be inferred from circumstances so strong as to leave no doubt of the owner's intention; as if he was present at the making of the contract, or if he himself delivered to the creditor the thing pawned.

Although the property of another cannot be given in pledge without his consent, yet, so long as the owner refrains from claiming it, the debtor, who has given it in pledge, cannot seek to have it restored until his debt has been entirely discharged.

Trustees of minors, and creditors of persons under interdiction, of vacant estates and of absent heirs, testamentary executors and other administrators, named or confirmed by a judge, are forbidden to give in pledge the property confided to their administration, without being expressly authorized in the manner prescribed by law. And an attorney cannot give in pledge the property of his principal without the consent of the latter, or an express power to that effect. Nevertheless, where the power of attorney contains a general authority to mortgage the property of the principal, this power is declared to include that of giving it in pledge.

The property of cities and other corporations can only be given in pledge according to the rules, and subject to the restrictions, prescribed or established by their respective acts of incorporation. And a partner cannot, for his own concerns, give in pledge the partnership property without the consent of his associates; he cannot do it even for the partnership concerns without such consent, unless he be vested with the management of the copartnership. This rule, however, admits of exception in matters of commercial partnership.

It is made essential to the contract of pledge that the creditor be put in possession of the thing given to him in pledge; and, consequently, that actual delivery of it be made to him, unless he has possession of it already by some other right. But this delivery is only necessary with respect to corporeal things. As to incorpo-

real rights, such as credits, which are given in pledge, the statute declares that the delivery is fictitious and symbolical.

With respect to the pawn, the statute provides that one may pawn every corporeal thing which is susceptible of alienation. One may even pawn merely as a security for performing or refraining to perform an act. And one may, in fine, pawn incorporeal movables, such as credits, and other claims of that nature.

But where a debtor wishes to pawn a claim on another person, he must make a transfer of it in the act of pledge, and deliver to the creditor, to whom it is transferred, the note or instrument which proves its existence, if it be under private signature, and must indorse it if it be negotiable.

The pawn invests the creditor with the right of causing his debt to be satisfied by privilege, and in preference to the other creditors of his debtor, out of the product of the movable, corporeal or incorporeal, which has been thus burdened. But this privilege can take place against third persons only in case the pawn is proved by an act, made either in a public form or under private signature: provided such act has been recorded in the manner required by law; provided, also, that whatever may be in the form of the act, it mentions the amount of the debt as well as the species and nature of the thing given in pledge, or as a statement annexed thereto of its number, weight and measure.

When a debtor wishes to pawn promissory notes, bills of exchange, stocks, obligations or claims upon other persons, he must deliver to the creditors the notes, bills of exchange, certificates of stock, or other evidences of the claims or rights so pawned; and such pawn, so made, is declared, without further formalities, to be valid, as well against third persons as against the pledgors thereof, if made in good faith.

The statute provides that all pledges of movable property may be made by private writing, accompanied by actual delivery; and the delivery of property on deposit in a warehouse is made to pass by the private assignment of the warehouse receipt, so as to authorize the owner to pledge such property; and such pledge, so made, without further formalities, is declared to be valid, as well against third persons as against the pledgors thereof, if made in good faith. But if a credit, not negotiable, be given in pledge, notice of the same is required to be given to the debtor.

The acts of pledge in favor of the banks of the State, the statute

declares, shall be considered as forming authentic proof, if they have been passed by the cashiers of those banks or their branches, and contain a description of the objects given in pledge, in the manner directed as before stated.

Where a thing given in pledge consists of a credit not negotiable, to enable the creditors to enjoy the privilege mentioned, it is made necessary, not only that the proof of the pledge be made by an authentic act, or by act under private signature, duly recorded, but that a copy of this act should have been duly served on the debtor of the credit given in pledge. On the other hand, this notification by the act of pledge to the person owing the debt pledge, is declared not to be necessary if the debt is evidenced by a note or other instrument, payable to the bearer or to order; because, in that case it will suffice that the note or instrument shall have been indorsed by the person pledging it, to invest the creditor with the privilege before mentioned. In no case does this privilege subsist on the pledge, except when the thing pledged, if to be a corporeal movable or the evidence of the credit, if it be a note or other instrument under private signature, has been actually put and remained in the possession of the creditor, or of a third person agreed on by the parties.

Where several things have been pawned, it is declared that the owner cannot retake one of them without satisfying the whole debt, though he offers to pay a certain amount of it in proportion to the thing which he wishes to get. And the creditor, who is in possession of the pledge, can only be compelled to return it, but when he has received the whole payment of the principal, as well as the interest and costs.

The creditor cannot, in case of failure of payment, dispose of the pledge; but where there have been pledges of stocks, bonds or other property, for the payment of any debt or obligation, it is made necessary before such stocks, bonds or other property so pledged shall be sold for the payment of the debt for which such pledge was made, that the holder of such pledge be compelled to obtain a judgment in the ordinary course of law, and the same formalities, in all respects, must be observed in the sale of property so pledged as in ordinary cases. And any clause which should authorize the creditor to appropriate the pledge to himself, or dispose thereof without the formalities prescribed by the statute, it is declared shall be null.

It is provided that, until the debtor be divested of his property, he remains the proprietor of the pledge, which is in the hands of the creditor only as a deposit to secure his privilege on it; and the creditor is answerable agreeably to the rules which have been established under the title *of conversional obligations*, for the loss or decay of the pledge, which may happen through his fault. On his part the debtor is bound to pay to the creditor all the useful and necessary expenses which the latter has made for the preservation of the pledge. The fruits of the pledge are deemed by the statute to make a part of it, and, therefore, they remain, like the pledge, in the hands of the creditor, but he cannot appropriate them to his own use; he is bound, on the contrary, to give an account of them to the debtor, or to deduct them from what may be due to him. If it is a credit which has been given in pledge, and if this credit brings interest, the creditor is required to deduct this interest from that which may be due to him; but if the debt, for the security of which the claim has been given, brings no interest itself, the deduction is required to be made on the principal debt. If the credit, which has been given in pledge, becomes due before it is redeemed by the person pawning it, the creditor, by virtue of the transfer which has been made to him, is declared to be justified in recovering the amount, and in taking measures to recover it. When received, he must apply it to the payment of the debt due to himself and restore the surplus, should there be any, to the person from whom he held it in pledge.

The pawn cannot be divided, notwithstanding the divisibility of the debt between the heirs of the debtor and those of the creditor. The debtor's heir, who has paid his share of the debt, cannot demand the restitution of his share of the pledge, so long as the debt is not fully satisfied; and, respectively, the heirs of the creditor, who has received his share of the debt, cannot return the pledge to the prejudice of those of his co-heirs who are not satisfied.

If the proceeds of the sale exceed the debt, the surplus is required to be restored to the owner; if, on the contrary, they are not sufficient to satisfy it, the creditor is entitled to claim the balance out of the debtor's other property. The debtor who takes away the pledge without the creditor's consent, commits a sort of theft, in the language of the statute. Where the creditor has been deceived in the substance or quality of the thing given in

pledge, the statute provides that he may claim another thing in its stead, or demand immediately his payment, though the debtor be solvable.

And the statute provides that the creditor cannot acquire the pledge by prescription, whatever may be the time of his possession.

The antichresis is required to be reduced to writing, and the creditor by it acquires the right of reaping the fruits of the immovables given to him in pledge. The creditor is required to pay the taxes on the property pledged unless the contrary be stated in the contract. He is required also under penalty of damages to provide for the keeping, use, and necessary repairs of the pledged estate. The debtor cannot, before full payment of the debt, claim the enjoyment of the pledge. But the creditor may compel the debtor to retake the enjoyment of his immovable.

The rights of the parties in the antichresis are similar to those in an ordinary pawn or pledge. The creditor, who is in possession by way of antichresis, cannot have any right or preference on the other creditors; but if he has by any other title, some privilege or mortgage lawfully established or preserved thereon, he will come in his rank as any other creditor (*Revised Civil Code of 1870, title 20, ch. 2, 3*).

In the State of Maryland there seems to be no statute in respect to pledges or pawns. And in the general statutes of Michigan, the only provision upon the subject, is that which declares that the interest of the pledgor in the thing pledged may be sold on execution against him, and the purchaser will be entitled to the thing on complying with the terms of the pledge (*2 Comp. Laws, ch. 131, § 23, general section 4461*).

No statutes upon the subject of a general nature exist in the States of Minnesota, Mississippi, Missouri, Nebraska, Nevada and New Jersey.

In the State of Ohio it is provided by statute that any person or persons carrying on the business of pawnbroker, or of loaning money on jewelry, goods, chattels, or other personal property, in any city of the first or second class, shall be required to take out a license from the city in which they may do business; the cost of such license not to exceed \$200 per annum, to be fixed by ordinances of the council of such city.

Pawnbrokers are required to keep a correct list and description, in a book for that purpose, of any and all articles pledged or

deposited with them, or on which advances of money have been made, or which may be purchased by them, which list and description must at all times be open to the inspection of the chief of police of the city, or of a police officer deputed by him, or by the mayor, to make such inspection. They must, at all times when so required by the chief of police or such police officer or mayor, produce and show to him any article so listed and described, which may be in their possession. And any person violating any of the provisions of the statute, upon conviction thereof, is subject to be fined in any sum not less than ten nor more than \$100 (*Sup. to R. S.*, 821, 822).

The State of Oregon has no legislative enactments in respect to pawns or pledges, or pawnbrokers or the business of pawnbroking, and consequently the common law governs the subject in that State.

In the State of Pennsylvania, it is provided by statute that any goods or chattels of any defendant in a writ of *fiery facias*, which shall have been pawned or pledged by him as security for any debt or liability, shall be liable to sale upon the execution, but subject nevertheless to all and singular the rights and interests of the pawnee to the possession or otherwise of such chattels or goods by reason of such pledge (*Purdon's Dig.*, 432, § 13).

The statute further provides that persons advancing money on pledge of goods by a factor, without notice that such factor is not the actual owner of such goods, shall acquire the same interest and authority in and over the goods as he would have acquired thereby if such factor had been the actual owner thereof; and that if the pledge was taken with notice that such factor is a factor only, then the pledgee shall acquire the same interest he had against his principal. The owner of the goods thus pledged may, however, redeem such goods by paying or tendering the amount advanced thereon to such factor (*Purdon's Dig.*, 453, §§ 3-5).

There seems to be no special statutory provision in respect to pledges or pawns in the States of South Carolina, Tennessee, Texas, Virginia or West Virginia.

And in the State of Wisconsin there is only a provision that where goods and chattels shall be pledged for the payment of money or the performance of any contract or agreement, the right and interest in such goods of the person making such pledge may be sold on execution against him, and the purchaser shall acquire all the right and interest of the defendant in the execution, and

shall be entitled to the possession of such goods and chattels on complying with the terms and conditions of the pledge (*Rev. Stat.*, *ch.* 134, § 21).

This concludes the statutory provisions of the several States upon the subject of pawns or pledges and the business of pawn-broking, and here closes the discussion of the general subject of pawns or pledges in the United States.

The Law of Usury, Pawns or Pledges, and
Maritime Loans.

PART III.

THE LAW OF MARITIME LOANS.

CHAPTER LV.

ANTIQUITY OF MARITIME LOANS — TEXTS OF THE ROMAN LAW RELATING TO THE SUBJECT — DEFINITION, LEGALITY AND NATURE OF A MARITIME LOAN — THE CONSTITUENTS OF A BOTTOMRY CONTRACT — DIFFERENCE BETWEEN BOTTOMRY, LOAN, PARTNERSHIP AND INSURANCE — FORM OF A CONTRACT OF MARITIME LOAN.

THE subject of maritime loans is so nearly related to the other subjects considered in this work that it may be appropriately treated in the same volume. A few brief statements have already been made, in a previous chapter on usury, in respect to bottomry and respondentia (*ante, ch.* 14); but a more extended notice of the general subject of maritime loans is necessary than that contained in the two or three pages there devoted to it.

There is a resemblance between contracts of maritime loan and insurance, and they are frequently governed by the same rules; and, yet, each has a character peculiar to itself. Insurance has acquired an extensive empire, and it enjoys a dignity which surpasses that of maritime loans; and, yet, maritime law possesses certain privileges of which insurance is deprived, and it is much more ancient in its origin. Insurance was little known to the ancient Romans; while the contract of maritime loans was in general use among them, under the name of *pecunia trajectitia*. Money, lent at maritime interest and risk, was so called because it was lent to a person, to be employed by him in maritime commerce, upon condition of returning it in case of a successful trade with maritime interest. And there was a stipulation in the contract that the money lent should not be returned, nor should interest be paid for the loan of it, if the vessel should happen to be lost by the perils of the sea in the prosecution of a specified voyage (*Calvinus*).

The texts of the Roman law relating to maritime loans, expressed in the briefest manner possible, were as follows: The money was given to the borrower, to be employed by him in commercial speculations upon and beyond seas; or, in other words, it was

taken, to be transported beyond sea at the risk of the lender, and to be employed in merchandise for the advantage of the borrower.

If the money lent was expended in the same place in which it was furnished, it was not said to be *trajectitia*; but if it was expended in the purchase of merchandise in the place where it was lent, and the merchandise was afterward embarked at the risk of the lender, it was held to preserve its quality of being *trajectitia*. So that the essence of the maritime loan, by the Roman law, consisted in the hazard of the lender. The money was not at the risk of the lender until the vessel had set sail; but from that moment the lender incurred the hazard. Until the maritime peril was incurred by the lender, nothing could be claimed for the use of his money but common legal interest, and he was not permitted to retain the pledge or lien that had been given him to demand maritime interest, because that interest was not due to him.

It was lawful to lend upon bottomry, or for an entire voyage, or for a limited time; but as soon as the lender had ceased to run the risk, the common and not the maritime interest was to be paid. The lender was not prohibited from demanding pledges and hypothecations as an additional security, provided that it was not a pretext for exacting maritime interest after the sea risk should be at an end. That which was received beyond the principal was a premium paid for the risk; or it was less an interest than an increase of the debt, in consideration of the peril to which the money was exposed. The lender was not prejudiced by a loss which happened at sea through the fault of the borrower. From the moment that the vessel left the port at which the money was borrowed, until she arrived at the port of her destination, the perils of navigation were at the risk of the lender, who had agreed to incur them. But if there was no stipulation to that effect, the borrower ran the risk. But, in that case, the lender was not permitted to stipulate for or receive any more than his principal with legal interest. In which case, the contract was a mere hypothecation or pledge of the vessel or goods for the security of the money which had been lent; but it was not, properly speaking, a maritime loan.

Such are, in a few words, the texts of the old Roman law upon this subject of maritime loans, which are fully explained in the ancient and learned commentaries, *Stypmannus* and *Locenius*. According to the *Guidon de la Mer*, the contract of bottomry,

such as is now in customary use, has very little resemblance to that which was used by the ancient Romans. But it will be observed, in the course of the examination of the subject, that this assertion is not strictly accurate, except as it regards the form which modern rules have given to the contract whose origin is lost in antiquity.

According to M. Pothier, the contract of maritime loan "is an agreement, by which one, who is the lender, lends to another, who is the borrower, a certain sum of money, upon condition that if the thing, upon which the loan has been made, should be lost, by any peril of the sea, or *vis major*, the lender shall not be repaid, unless what remains shall be equal to the sum borrowed; and that if the thing arrive in safety, or in case that it shall not have been injured, by its own defect or the fault of the master and mariners, the borrower shall be bound to return the sum borrowed, together with a certain sum agreed upon as the price of the hazard incurred" (*Pothier's Contrats a la Grosse*, No. 1). This definition is taken from the Roman laws, and it is about the same as found in all the books. It is called *gross adventure*, because the lender exposes his money to the perils of the sea, and contributes to the gross or general average. And it is also called a loan on the return voyage, because the lender generally runs all sea risks until the safe return of the ship.

He who furnishes the money, in case of a contract of bottomry, is termed the lender, and he who receives it, the borrower; in the Roman law the lender was termed the creditor. The condition of the contract is said to be fulfilled when the vessel arrives in safety at her destined port; and it is not performed when the voyage is not completed. The interest which the lender claims, in case of a successful voyage, is the price of hazard, *periculi pretium*, and the contract has nothing in it which resembles usury. And bottomry bonds may be given for the security of mercantile or other debts, either in places where the owners dwell or in foreign places by their order (*Forbes v. The Brig Hannah*, *Bee's Adm. Dec.*, 348).

Bottomry is adopted in all commercial countries, and has been introduced into commerce for the advantage of society. It is not a sale, nor a partnership, nor a loan, properly speaking, nor an assurance, nor a contract composed of different kinds; but it is a specific contract, known to the law, and has a character and qualities peculiar to itself.

To constitute the contract of bottomry, the money must be invested in something which is exposed to the dangers of the sea; and, in case of loss, it is incumbent on the borrower to prove property to the amount of the loan. It is not less essential to the contract that the peril be borne by the lender (*Pothier, No. 16, h. t.*). It cannot properly be said to be a contract of bottomry until the day that the risk commences. Hence, if the borrower expend the money on shore, without exposing it to the dangers of the sea, it cannot be a contract of bottomry, although the instrument of writing between the parties may call it so (*Turnbull v. The Ship Enterprise, Bee's Adm. Dec., 345*). As soon as the risk ceases, either by the safe arrival of the vessel or by the expiration of the stipulated term, the contract ceases to bear a maritime interest. And if the contract was void in its commencement, the maritime interest is not chargeable, because no maritime dangers were borne by the lender. A bargain on a mere contingency, where the reward is given for the risk, not for forbearance, as has been shown in the comments upon usury, will not be within the statutes against usury (*Button v. Downham, Cro. Eliz., 643*). It follows, from this, that a *bona fide* contract of bottomry is not obnoxious to the statutes prohibiting usury; for if a man give or lend money, not to be paid if the event should be one way, but double if the other, and it is uncertain which way it will happen, the transaction cannot be usurious, because the reward is given for the risk and not for the forbearance. This doctrine has been fully discussed in previous chapters on usury, and need not be dwelt upon in this place.

It has been intimated that there is a manifest difference between contracts of bottomry and those of loan, partnership and insurance. Bottomry is different from the contract of loan, because: 1st. The peril of money, simply lent, concerns the borrower; whereas money lent at bottomry is at the risk of the lender. 2d. In a simple loan, interest is not due but by positive stipulation; whereas maritime interest is implied in the contract itself. 3d. In a simple loan, the interest, among merchants, cannot exceed the rate fixed by statute, or, at most, the custom of the country; whereas bottomry may carry any interest which may be agreed upon by the parties. 4th. Legal interest is sometimes calculated annually, or at other fixed periods, in a successive manner, and separate from the principal; whereas the whole maritime interest

is due jointly with the principal and at the same time, and the maritime interest is an augmentation of the principal.

It is remarked in common parlance that the contract of bottomry is a kind of partnership which is formed between the lender and the borrower, and some of the early writers declared it to be so. But in order to constitute a partnership, the capital, the loss or the gain should be shared or borne in common by both of the parties. Here nothing is common between them. There is therefore no partnership. In fact, partnership is an agreement between two or more persons, by which they hold all or a part of their goods in common; or it may be for a particular voyage, a particular work or other affair, in which they are to bear the loss or reap the profits in certain proportions. But money lent at gross adventure belongs properly to him who has received it. The profits of the voyage belong to him exclusively, with the exception of the maritime interest which he is obliged to pay. The sea risks are borne by the lender. It is certain, then, that a contract of maritime loan is not a partnership, notwithstanding certain authors have supposed that they could perceive a species of partnership in the contract. It may be remarked, however, that there is nothing to prevent the uniting the contract of maritime loan with that of partnership, if such may be the desire of the parties. The contract of maritime loan approaches more nearly to that of marine insurance. There is a strong analogy between these two transactions. In their effects they are construed on the same principles. In case of the maritime loan, the *lender* bears the sea risks; in that of marine insurance, the underwriter bears the risk. In the one contract, the maritime *interest* is the price of the peril; and this term corresponds with the *premium* which is paid in the other. The rate of the premium or interest is greater or less, according to the duration and nature of the risk. In either case it is incumbent upon the plaintiff to prove that the condition has been fulfilled. "In case of a suit, it lies upon the lender, in order to render the contract of maritime loan executory, to show that the ship has arrived at her port of destination in safety; and in an action on a policy of insurance, it lies upon the assured to prove the loss, capture or shipwreck of the vessel" (*Cleirac, on the Guidon de la Mer.*, ch. 18, art. 2, p. 331). In each contract, it may be laid down as a general rule that the subject of the risk should be on board at the time when the accident happens. In

general, the assurer and the lender are not responsible for the barratry of the captain, or for losses occasioned by the fault of the assured or the borrower.

But assurance and maritime loan are different in many respects. In case of shipwreck, the lender has a lien upon all the effects saved, without admitting the borrower to any participation with him. On the contrary, if the whole of the property is not covered by the policy, the assured takes a part of the goods saved in common with the assurers. By the policy, the assurer may restrict himself to particular sea risks; but against lenders, such a limitation would be void. The formality of abandonment, which is necessary in insurance, is unknown in the contract of maritime loan. In assurance the date of the policy must be attended to, in order to regulate the return premium; but it is not regarded in contracts of maritime loan, effected for the same purpose and in the same place. The assured may stipulate that, in case of abandonment he shall not be obliged to pay freight; the same indulgence is not granted to the lender on the vessel. There are other distinctions between the two contracts, but it is unnecessary to note them.

In respect to the form of the contract of maritime loan, there is nothing of especial importance which needs to be stated. The contract may be drawn up in such a manner as the parties may find suitable. It is sufficient, if the language be clear and unequivocal. It must contain proper clauses, and nothing must be stipulated which is contrary to the nature of the contract. It will be interpreted upon the same principles of other contracts; and it will be sufficient if the intention of the parties can be ascertained. The contract may be made before a notary or under private signature. M. Pothier says: "The instrument under private signature, where it is acknowledged or proved, is equally authentic with that which is executed before a notary public, as against the borrower and his heirs. But it is not so as to third persons, against whom the lender may wish to enforce the privileges attached to his contract. The date of instruments under private signature is not regarded as against third persons, if it be not proved by some other means than the instrument itself" (*Pothier*, n. 29). This last rule, cited by the learned author, relates only to liens against purchasers. It is otherwise where the question is of mere privity. Such is the view taken at the present day.

The contract should contain the names of the borrower and lender, and those of the captain and the vessel. It should also mention the amount lent, the rate of interest, the times and places of the risk, and whether the money is lent on the bottom or the cargo, jointly or separately, and all other lawful stipulations which the parties may think proper to make. It has been sometimes said to be necessary to state, by a special clause in the contract, that the lender undertakes to bear the maritime risks, but this agreement will be presumed. It is sufficient that it plainly appear that the money is lent at maritime interest upon the vessel or cargo, or both, to put the risks of the sea upon the lender.

A promissory note for *value received* in money lent at gross adventure, without further explanation, would not be called a bottomry bond, because it is wanting in the particulars before stated to be requisite in such an agreement. Other points respecting the internal form of these contracts will be referred to in the course of this discussion. Those already noted will suffice for the present. Certain specifications are peremptorily required in transactions of bottomry, on account of the privileges attached to this species of contract and to prevent abuses. But these particulars will be made apparent as the general rules, in relation to bottomry bonds, are more especially considered.

CHAPTER LVI.

MARITIME INTEREST — GENERAL RULES IN RESPECT TO IT — RATE OF MARITIME INTEREST — COMMON LEGAL INTEREST — THE FRENCH DECISIONS UPON THE SUBJECT.

THE greatness of maritime interest, says Montesquieu, is founded upon two considerations: The dangers of the sea, which render it proper that we should not incur such hazards without a prospect of uncommon advantages, and the facility by which the borrower affects exterior speculations in consequence of the loan. On the other hand, common legal interest, not being supported by such reasons, is either entirely prohibited by the legislature, or, which is more reasonable, it is restricted by proper limits (*Montesq. Liv. 22, ch. 20*).

We cannot call that a contract of gross adventure, says Pothier, which does not contain a stipulation for the payment of maritime

interest; that is, the borrower must be bound to return not only the principal, but an additional sum, or some other compensation for the risk incurred. If a person lend a sum of money to a master of a vessel for a certain voyage, with an agreement that it is not to be returned in case of loss or the capture of the vessel by a *vis major*, and does not stipulate for a maritime profit, it cannot be called a contract of gross adventure. But it is merely a contract of loan, mingled with a donation of the money lent in case of the loss or capture of the vessel, which donation would become valid upon the delivery of the money, provided the parties were able to contract (*Pothier, n. 19, h. t. Emerig. des. Assur., ch. 3*).

In general, maritime interest is payable in money; but according to Pothier and the holding of the courts, in this country and in Europe, the parties may stipulate for any other thing in which the maritime interest shall be paid. And as the lender may stipulate for anything, by way of interest, that is for any advantage to himself in case of the safe return of the vessel, it is obvious that this advantage, whatever it may be, should be such an interest as will give the legal character of gross adventure to the contract. For example, a captain in time of war being at Smyrna and in want of money to victual his ship, borrowed of a French merchant 1,000 piasters, Turkish money. Upon the safe arrival of his ship at Marseilles, he engages to return this money at the rate of a French crown for each piaster, the perils of the sea being at the risk of the lender. This is a real contract of gross adventure, as the French would call it, or contract of bottomry. The difference between the two coins constitutes the maritime premium and the price of the risk. The captain, therefore, upon his safe arrival, should be obliged to pay the full sum of 3,000 livres, which would, in fact, be paying a premium of about twenty per cent on the sum borrowed. Maritime interest is not due to a lender who has run no risk, even if it should so happen in consequence of the act of the borrower, and, as the law now stands, the lender cannot demand the principal nor premium, nor maritime interest, if the thing upon which he lent his money be entirely lost by the accident of the sea.

In respect to the rate of maritime interest, it may be remarked that it may be regulated by the degree to which the lender exposes or believes he exposes his money. Targa says that if the rate stipulated be excessive, it is in the power of the court to lessen it

(*Targa*, ch. 53, n. 19, p. 149). Pothier observes that "although maritime profit, at however exorbitant a rate it may have been fixed in the contract of gross adventure, is always considered *in foro exteriori* as nothing more than the price of the maritime perils, and is therefore lawful; yet if the intention of the parties was to comprehend in that profit, besides the price of the risk, or compensation for the loan and the credit given by the lender, this profit would be, as to the compensation, unlawful and usurious *in foro conscientie*" (*Pothier*, n. 2, h. t.). But everything which belongs to the *forum conscientie* may be taken notice of *in foro exteriori*, where a contract contains clauses which are repugnant to the nature of it or where fraud is proved, for equity is a part of the law, and law is a science as immutable as its Author, and the duty of judges consists in making it respected.

Maritime interest or premium is generally stipulated at so much per cent for the entire voyage, or by the month, etc. The stipulated rate of interest is not affected by the unexpected arrival of peace or war, unless the event was provided for in the contract. Such seems to be the general understanding of the law, notwithstanding Pothier seems to have expressed a contrary opinion. It is a general rule that the moment the risk commences the whole maritime premium becomes due, although the contemplated voyage is interrupted or the risk ceases before the expiration of the stipulated term.*

Where the lender has begun to incur the risks, says Pothier, although he has not borne them all the time that he contracted to bear them, the voyage having been shortened, the entire maritime profit is not the less due to him, provided no accident of *vis major*

* The French writers, when they speak of the consideration given for maritime loans, employ a variety of words in order to distinguish it according to the nature of the case. Thus they call it interest where it is stipulated to be paid by the month or at other stated periods. It is a *premium* where a gross sum is to be paid at the end of a voyage; and here the risk is the principal object which they have in view. Where that sum is a *per centage* on the money lent they denominate it *exchange*, considering it in the light of money lent in one place to be returned in another, with a difference in amount between the sum borrowed and that which is paid, arising from the difference of time and place. Where they intend to combine these various shades into one general denomination, they make use of the term *maritime profit* to convey their meaning (*Vide Emerigon's Maritime Loans*, 56, note). This explanation may be convenient to enable one to understand the meaning of the text where these expressions may occur,

has occurred to occasion the loss of the goods upon which the loan was made (*Pothier*, n. 40, *h. t.*).

Where the money has been borrowed for the voyage out and home and the vessel fails to return, it has been a matter of considerable discussion what premium the lender will be entitled to collect. But it has been long settled by the French Admiralty Courts that if the property, upon which the loan was made, be safely landed, no deduction from the maritime interest is to be made, although the vessel do not return or be lost on her voyage. If the borrower squander the property or its proceeds, or dispose of it according to his own pleasure, instead of shipping the property in another vessel, he is bound to repay the sum borrowed with maritime interest (*Vide the cases given in Emerigon's Essay on Maritime Loans*, 55-60).

Upon the termination of the maritime risks, if the borrower delay the fulfillment of his contract, the charge of common legal interest attaches *ipso jure*, although it may not be judiciously demanded. M. Pothier, after remarking that the principal of money lent at gross adventure carries common legal interest only from the date of the judgment, adds that "the same rule does not extend to maritime interest, this profit being an accessory, which is given by way of interest on the sum lent, *nautica usura*, *nauticum fœnus*. You cannot demand interest upon it. It would be interest upon interest, a compound interest which the laws prohibit, *accessio accessionis non est*" (*Pothier*, n. 51, *h. t.*).

Decormis, after having said that "when the peril ceases and the vessel has returned, maritime interest ceases, *ipso facto*, and legal interest commences," adds, that "it is by relation only to that which is due upon the principal; and you cannot, by adding it to and merging it in the profits, obtain interest upon the total sum" (2 *Decormis*, 810).

The French decisions add common legal interest to the maritime interest, not only from the time of the demand, but from the time that the latter became due. This point was not disputed when M. Emerigon wrote, about 100 years ago, and yet he seems to have been in doubt whether the point was not disputable. He observes: "In the first place, it is certain that the contract of maritime loan is not a partnership, as I have before proved; and there is no law which provides that maritime interest shall, *ipso jure*, carry common legal interest. Upon what authority, then, do

our decisions rest? They say that maritime interest is the price of peril, *periculi pretium*; that it is an increase of the obligation, according to the words of the law; that it is an addition to the capital, according to the language of *Doumoulin*; that this interest, being added to the principal, becomes identified with it, and the two sums make an entire whole which ought to carry interest. To such sophistry are they reduced; and I cannot suppress my emotion when I behold them in this manner overwhelm an unfortunate debtor, who returns to his country to be imprisoned by his fellow-citizens, after he has escaped from the hands of pirates and survived the perils of the sea. If, in contracts which flow from commerce, the law has paid more regard to public convenience than to personal liberty, we ought at least not to be more rigorous than it is, and enlarge by a new addition that which is, in truth, but an addition itself. It would not be surprising if this point in our jurisprudence should be one day overruled. It is supported by mere *apices juris*" (*Essay on Maritime Loans*, 62, 63). But the point has never been overruled, and there seems to be no good reason why it should be. The argument in favor of the rule is this: The maritime interest is a reward for the risk which the lender has incurred. When the peril ceases he is entitled to his reward immediately. If it be withheld, the creditor is entitled to a compensation for the use of his property, from which he might have derived an advantage, by lending it again, if he had received it when it became due. If the common legal interest was not added to the maritime interest from the time the latter became due, the lender would calculate not only upon the perils of the sea, but upon the danger of delay upon land, and increase the maritime interest accordingly. The borrower might thus be injured by the very rule which was intended for his benefit.

If the risk is not commenced, the contract will become a simple loan, even though the borrower covenant to perform the voyage (*Marshall on Insurance*, 647). And Marshall thinks that if the lender has insured his principal, he should receive one-half per cent upon the maritime interest and all costs of insurance, together with his principal. Of the same opinion is Valin; and Emerigon agrees with them, provided the non-performance of the voyage happen through the fault of the borrower.

A little over a hundred years ago, a case, involving this ques-

tion, with others, came before the Admiralty Court at Marseilles, in France, and the rule was laid down in accordance with the principles here stated. It appeared that, in the year 1758, Jean Baptiste Margerel, mate of the Pink called *la Vierge de la Garde*, commanded by Captain Clastrier, borrowed of Armelin six dozen skins of morocco leather, for which he executed a respondentia bond, binding himself to pay 270 livres and 100 per cent free from average, on the safe return of the vessel to Marseilles. The vessel arrived in safety at Cayenne; Margerel's adventure procured 960 livres, which he received in paper money. The vessel was then declared not to be seaworthy. Margerel, not being able to find a vessel by which he could make a return shipment, was obliged to convert his money into a bill of exchange upon the royal treasury, which was never paid.

Armelin filed a petition against him, claiming the 270 livres, together with maritime and legal interest. Margerel replied that his contract was conditional, and that he was only to be bound in case of the safe arrival of the vessel; that the vessel never did return, having been declared unseaworthy; that he had not been able to find a vessel by which he could ship goods in return for Marseilles; and that, consequently, according to the 17th article of the ordinance, *hoc titulo*, the contract was reduced to the value of the things saved, to wit, a draft on the royal treasury, which he offered to deliver up.

On the 27th of June, 1760, a sentence was rendered in favor of Margerel, by which the plaintiff was nonsuited. From this decision Armelin appealed. He contended that the goods had been safely landed before the vessel was condemned as not seaworthy; and that, as Margerel had disposed of them according to his own discretion, at Cayenne, the contract was still in force.

An arrêt passed in June, 1761, on the report of M. de Corriolis, deciding, 1st, that notwithstanding the loss of the ship in the course of the voyage, the contract of gross adventure was in full existence as to effects landed. 2d. That the borrower, who has not been able to send returns by another vessel, is obliged to give an account of the proceeds of the outward shipment. 3d. That if he do not render this account, he ought to pay the principal, together with maritime and common legal interest.

The result of the French decision is that if the goods, upon which the loan was made, be safely landed, no deduction from the

maritime interest is to be made, although the vessel do not return or be lost on her voyage. If the borrower squander the goods or their proceeds, or dispose of them according to his own pleasure, instead of shipping them in another vessel, he is bound to return the sum borrowed with maritime interest entire. This would seem to be a quite reasonable doctrine; and, yet, the question may depend very much upon the precise terms of the contract.

It has been said that maritime interest must be provided in the bond or contract, or the loan cannot be considered one of bottomry; and such is the doctrine of some of the American courts (*Vide Leland v. Medora*, 2 Woodb. and Minot's R., 92, 107). This, however, has been thought to be inaccurate; and, indeed, the contrary has been expressly laid down in the English admiralty courts. Said Dr. Lushington, in a case of unquestioned authority: "I am aware that it is not absolutely necessary that a bottomry bond should carry maritime interest, and that a party may be content with ordinary interest; but when the argument in support of the bond is that the advance of the money was attended with risk, it is a material circumstance that only an ordinary rate of interest should be demanded. It is impossible to conceive that any merchant, carrying on his business with ordinary care and caution, would be content to divest himself of all security for the loan of his money lent on bottomry bond, and ask no greater emolument than the ordinary rate of six pounds per cent, if the repayment of such a loan was to depend upon the safe arrival of the vessel at the port of her destination, after performing such a voyage" (*The Emancipation*, 1 Robinson's R., 124, 130). Here it is *conceded*, at least, that a loan may be made on bottomry at common legal interest only, although it is very properly suggested that lenders would not be likely to take the risk, which is always implied in a maritime loan on bottomry, without reserving "marine interest," or as much more than legal interest as will serve to cover the risk.

It may be repeated that, if the interest in the case of a maritime loan be not expressed in the contract, it will, as a general rule, be presumed to be included in the principal (*The Mary*, 1 Paine's C. C. R., 671). But this whole subject of maritime interest and common legal interest in bottomry and respondentia cases will be reverted to in another place.

CHAPTER LVII.

WHO MAY BE PARTIES TO A MARITIME LOAN — WHEN THE OWNER IS BOUND BY THE ACTS OF THE MASTER OF A VESSEL — OF BOTTOMRY BY THE MASTER — THE SAME BY THE OWNER OF A VESSEL — DIFFERENCE BETWEEN BOTTOMRY AND RESPONDENTIA.

It may be affirmed, as a general rule, that every person who has an interest in a ship or cargo may borrow money at gross adventure as far as his interest is put at hazard, and every person who is capable of contracting may make a maritime loan. Masters of vessels may sometimes borrow upon maritime loan on account of their owners, whether it be in the port where the vessel is fitted out or in the course of the voyage. But the laws of commerce have established certain rules and regulations in those cases which it is indispensable to understand.

It sometimes happens that a person is employed to act as the pilot of the vessel simply, to whom the direction of the voyage and the conducting of the ship safely into port is intrusted, while the owners of the vessel or the cargo place a supercargo on board, with power to demand freight, make all commercial operations, and pay the necessary expenses. In that case the captain is, saving the right of third persons, simply a pilot, and the supercargo is the master. But usually the functions of the pilot and supercargo are combined in the captain of the vessel, and then he is the master, and the owner is bound by his acts in all matters relating to the functions of his office.

Pothier observes that "the owners are supposed to appoint a master to transact the business of the ship only in their absence, and to do those things which they could not conveniently do themselves" (*Pothier*, n. 55, h. t.). According to this doctrine the captain can do nothing of consequence but with the approbation of the owners when he is in the port where they reside. Of course, a more general agency may be appointed to him, but simply as captain of the vessel, this statement is strictly accurate, and his powers are thus limited when in the port where the owners reside.

By the celebrated *Carsolito del Mare*, it appears that, in the place of the owner's residence, it is necessary the captain should have his consent to purchase the necessary rigging of the vessel. And in

an ancient ordinance of the Hanse Towns, it was provided that, "in the place of the owner's residence, no person shall cause repairs to be made to a ship, purchase sails, cordage or any other thing for her, nor borrow money on bottomry, without the consent of the owner, under penalty of being answerable to it himself." And again, that "those who lend on bottomry to the master at the place where the owner resides, without his consent, shall not have any lien or privilege, except only on the portion of interest which the captain may have in the vessel and freight, even although the contract was made for the purpose of obtaining repairs or victuals for the vessel."

It results from these statements that the contracts of bottomry, made by the captain in the place where the owner resides, without his consent, are not binding upon him, or rather that the lender is not entitled to hypothecation or privilege but upon the master's share, which alone is liable, when the loan is made by the master in the port where the owner resided.

But where the vessel is away from the port where the owner resides, the master has power to loan money upon bottomry in case money is needed and cannot otherwise be obtained; and in Europe contracts of bottomry are at present seldom made except by the master of the vessel in a foreign port. It has been often held by the courts of the United States that, to make a hypothecation given by the captain of the vessel valid, the necessity of raising the money in this way must be shown. So that if such an instrument be executed in a port where one of the owners resides, it follows that the same would be void; and such is the express holding of the courts (*The Lavinia v. Barclay*, 1 Wash. C. C. R., 49).

And the Supreme Court of the United States have held that a hypothecation of the ship, by the master, is invalid, unless it is shown by the creditor that the advances were necessary to effectuate the objects of the voyage or the safety of the ship, and that the supplies thus necessary could not be procured upon the owner's credit or with his funds at the place. And it was declared to be incumbent upon the creditor who claims on a hypothecation to prove the actual existence of the necessity of those things which give rise to his demand; and that if, from his own showing or otherwise, it appears that he had funds in his hands of the owners, which might have been applied to the demand, and he has neglected or refused so to do, he must fail in his claim. If various demands are mixed up

in his bond, some of which would sustain the hypothecation, and some not, the court declares it to be his duty so to exhibit them to the court that they may be separately weighed and considered.

The court further declared that the master of the ship is the confidential servant or agent of the owners, and they are bound to the performance of all lawful contracts made by him, relative to the usual employment of the ship and the repairs and other necessities furnished for her use. But that the authority of the master is limited to objects connected with the voyage; and if he transcend the prescribed limits, his acts become, in legal contemplation, nullities.

It was held, however, that a *bona fide* creditor who advances his money to relieve a ship from an actual arrest, on account of debts which are a lien upon him, may stipulate for a bottomry interest, and the necessity will justify the master, who has no other sufficient funds or credit, in giving it; but that a mere threat to arrest the ship for a pre-existing debt would not be a sufficient necessity to justify the master in executing a hypothecation.

Mr. Justice Story delivered the opinion of the court, and, among other things, said: "The law in respect to maritime hypothecations is, in general, well settled. The master of the ship is the confidential servant or agent of the owners, and they are bound to the performance of all lawful contracts made by him, relative to the usual employment of the ship and the repairs and other necessities furnished for her use. The rule is established, as well upon the implied assent of the owners as with a view to the convenience of the commercial world. As, therefore, the master may contract for repairs and supplies, and, thereby, indirectly bind the owners to the value of the ship and freight, so it is held that he may, for the like purpose, expressly pledge and hypothecate the ship and freight, and thereby create a direct lien on the same for the security of the creditor. But the authority of the master is limited to objects connected with the voyage, and if he transcend the prescribed limits, his acts become, in legal contemplation, mere nullities. Hence, to make a bottomry bond executed by the master a valid hypothecation of the ship, it must be shown by the creditor that the master acted within the scope of his authority; or, in other words, it must be shown that the advances were made for repairs and supplies necessary for effectuating the objects of the voyage, or the safety and security of the ship; and no presump-

tion should arise that such repairs and supplies could be procured upon any reasonable terms with the credit of the owner, independent of such hypothecation. If, therefore, the master have sufficient funds of the owner within his control, or can procure them upon the general credit of the owner, he is not at liberty to subject the ship to the expensive and disadvantageous lien of an hypothecatory instrument" (*The Aurora*, 1 *Wheat. R.*, 96; and *vide The Boston*, *Blatchford & Howland's Adm. R.*, 309).

A similar doctrine has been laid down by the Circuit Court of the United States. In an important case it was held that, where money has been advanced on the personal credit of the master or owner and the vessel had performed a subsequent voyage, a hypothecation by the master to secure the debt cannot be supported. And it was declared that the fact that the advances were necessary and were made on the security of the vessel, are not, in any instance, to be presumed. And it was further held that no officer of the vessel can legally make a hypothecation except the actual master; and that it constitutes a conclusive ground of objection to the validity of such an instrument that the master, by whom it was given, had, before the advances were made and the bond given, resigned his command and another master had succeeded to it (*Walden v. Chamberlain*, 3 *Wash. C. C. R.*, 290; *Hurry v. The John and Alice*, 1 *ib.*, 293; *Patton v. The Randolph*, *Gilpin's R.*, 457).

But it has been held by the District Court of the United States for the southern district of New York that a master, appointed by the American consul in a foreign port, has authority to execute a bottomry bond in a proper case (*The Jacmel Packet*, 2 *Benedict's D. C. R.*, 107; *vide Fox v. Holt*, 36 *Conn. R.*, 558).

The Supreme Court of the United States have recently decided a case, in which the nature of the lien allowed by the maritime law upon a vessel for repairs and supplies ordered by the master while in a foreign port, upon the credit of the vessel, the circumstances upon which such lien arises, and the principles by which it is governed, were elaborately considered and stated, and the doctrine declared that, in the case of a lien asserted against a vessel supplied or repaired in a foreign port, necessity for credit must be presumed, where it appears that the repairs and supplies for which a lien is set up were ordered by the master, and that they were necessary for the ship when lying in port, or to fit her for an intended voyage; unless it is shown that the master had funds, or

that the owners had sufficient credit, and that the repairer, furnisher or lender knew those facts, or one of them, or that such facts and circumstances were known to them as were sufficient to put them on inquiry, and to show that if they had used due diligence they would have ascertained that the master was not authorized to obtain any such relief on the credit of the vessel.

Mr. Justice Clifford delivered the opinion of the court, and, among other things, observed: "Ports of States, other than those of the State where the vessel belongs, are, for that purpose, considered as foreign ports, and the authority of the master in contracting for repairs and supplies is not confined to such as are absolutely or indispensably necessary, but includes, also, all such as are reasonably fit and proper for the ship and the voyage. When such repairs and supplies are reasonably fit and proper, the master, if he has not funds, and cannot obtain such on the personal credit of the owners, may obtain the same on the credit of the ship, either with or without giving a bottomry bond, as necessity shall dictate. Reasonable diligence in either event must be exercised by the merchant or lender to ascertain that the repairs and supplies were necessary and proper, as the master is not authorized to hypothecate the vessel unless such was the fact, within the meaning of the maritime law" (*The Lulu*, 10 *Wallace's R.*, 192, 200, 201).

And in another case, decided by the same court and at the same term, the same doctrine was reaffirmed. Mr. Justice Clifford also delivered the opinion of the court in this case, and, in the course of his opinion, said: "Controversies respecting such liens usually arise in cases where the repairs and supplies were ordered by the master, without any express directions from the owner; and in such cases the repairer or furnisher must prove affirmatively that the ship needed such repairs and supplies, as the authority of the master in such a case is implied from the necessity for the repairs or supplies, the want of funds for that purpose, the inability to procure the same, and the absence of the owner.

"Where it appears that the repairs and supplies were necessary to preserve the ship in port, or to enable her to proceed on her voyage, and that they were made and furnished in good faith, the presumption is that the ship, as well as the master and owner, is responsible to those who made the necessary advances; and it is clear that the necessity for credit must be presumed where it

appears that the repairs and supplies were ordered by the master, and that they were necessary for the ship, unless it is shown that the master had funds, or that the owner had sufficient credit, and that the repairers, furnishers and lenders of the money knew those facts, or one of them, or that such facts and circumstances were known to them as were sufficient to put them upon inquiry, and to show that if they had used diligence they would have ascertained that the master was not authorized to obtain any such relief on the credit of the vessel.

"Subject to these conditions, the master, in the absence of the owner, is vested with the authority to order necessary repairs and supplies; but it is no objection to his authority that he acted on the occasion under the express instructions of the owner; nor will the lien of those who made the repairs and furnished the supplies be defeated by the fact that his authority emanated from the owner instead of being implied by law.

"When the owner is present, the implied authority of the master for that purpose ceases; but if the owner gives directions to that effect, the master may still order necessary repairs and supplies; and if the ship is at the time in a foreign port, or in the port of a State other than that of the State to which she belongs, those who make the advances will have a maritime lien, if they were made on the credit of the vessel" (*The Kalorama*, 10 *Wallace's R.*, 204, 212, 213; and *vide The Steamer Patapsco*, 48 *How. Pr. R.*, 301).

It may be affirmed, in general terms, that when the master has the authority to create a lien upon the vessel for repairs and supplies, he may exercise this authority by means of a bottomry bond.

The Circuit Court of the United States for the third circuit, at an early day, held that, where the original voyage is broken up abroad, the captain may borrow money upon bottomry to enable him to return home. It seems that the authority to hypothecate extends to any voyage which the master is authorized to make. In general, a consignee cannot take a bottomry bond from the master to secure his advances; but cases may exist where the consignee is not bound, more than any other lender, to advance for repairs, without taking the ship as security for a loan on maritime interest (*Cranford v. The William Penn*, 3 *Wash. C. C. R.*, 404; *vide Reade v. The Commercial Insurance Co.*, 3 *Johns. R.*, 352).

Indeed, it seems to be decided that, in case of necessary repairs,

the master may sell part of the cargo, or hypothecate it. If he has money on board belonging to shippers, he is not bound to apply it to the ship's necessities, before borrowing on bottomry, at least if not equal to the amount of repairs; but the law invests the master in such cases with a large discretion upon the subject. But it seems that where the master has sufficient money of the owners of the vessel, he cannot borrow on bottomry; nor can he legally do so if he has sufficient money of his own on board the vessel (*The Packet*, 3 *Mason's R.*, 255; *The Lavinia* v. *Barclay*, 1 *Wash. C. C. R.*, 49; *Rucher* v. *Conyngham*, 2 *Pet. Adm. R.*, 295). But the master of a vessel in a foreign port acting in the character of agent is limited in his power, as before shown, and can only pledge the vessel in case of necessity (*The Mary*, 1 *Paine's C. C. R.*, 671). And indeed, it has been held that a bottomry bond can be given by the master only under circumstances of great distress, and when he is destitute of other means; and only in a foreign port (*Tunno* v. *The Mary*, *Bee's R.*, 120; *Sloan* v. *The A. E. I.*, *Id.*, 250).

The authorities are uniform in holding that, to authorize a bottomry bond by a master, it must be given to enable the vessel to proceed on her voyage, and to leave a port where she is detained for necessary repairs, or for claims upon her, and has no funds, credit or other means of getting money (*Gibbs* v. *The Texas*, *Crabbe's R.*, 236; *Burke* v. *The M. P. Rich*, 1 *Clifford's R.*, 308).

The following propositions in respect to maritime hypothecation by the master of a vessel have recently been laid down by the Supreme Court of the United States:

1st. Liens for repairs and supplies, whether implied or express, can be enforced in admiralty only upon proof made by the creditor that the repairs were necessary, or believed upon due inquiry and credible representation to be necessary. 2d. Where proof is made of necessity for the repairs and supplies, or for funds raised to pay for them by the master, and of credit given to the ship, a presumption arises, conclusive, in the absence of evidence to the contrary, of necessity for credit. 3d. Necessity for repairs and supplies is proved where such circumstances of exigency are shown as would induce a prudent owner, if present, to order them, or to provide for the cost of them on the security of the ship. 4th. The ordering, by the master, of supplies or repairs upon credit of the

ship, is sufficient proof of such necessity to support an implied hypothecation in favor of the material-man, or of the ordinary lender of money, to meet the wants of the ship, who acts in good faith. 5th. To support hypothecation by bottomry, evidence of actual necessity for repairs and supplies is required; or if the fact of necessity be left unproved, evidence is required of due inquiry and of reasonable grounds of belief that the necessity was real and exigent (*The Grapeshot*, 9 *Wallace's R.*, 129).

But it has been held that, in order to constitute a sufficient foundation for a bottomry bond, the necessity for the supplies furnished need not have been so urgent that the vessel must have been lost to the owner without them. It is sufficient if, as matters then stood, they may, in the exercise of a discreet judgment, have appeared to be reasonable and proper for the interest of the owner (*Thomas v. Gettings*, *Taney's C. C. R.*, 472; *vide The Jacmel Packet*, 2 *Benedict's D. C. R.*, 107; *The Kathleen*, *Id.*, 458; *The Yuba*, 4 *Blatchford's C. C. R.*, 352).

As has been before suggested, the master can only hypothecate the vessel in a foreign port; but for this purpose it has been held that the ports of the different American States are foreign to each other (*Burke v. The M. P. Rich*, 1 *Cliff. R.*, 308). And it has been held that where the necessity for the repairs have been shown in case of bottomry by the captain, it is for the claimant to show that the money could not have been obtained otherwise than by bottomry (*The Kathleen*, 2 *Benedict's D. C. R.*, 458).

A vessel having entered a port of distress, necessary repairs were made upon her on her credit; and, afterward, it being impossible to procure funds in any other way, a loan was made on bottomry, and the money was applied to paying for the repairs. The court held that it was no objection to a recovery on the bottomry bond, that the repairs were made before the loan was effected. And it was further held that the bill of a stevedore for services rendered in ascertaining the repairs needed by a vessel was a proper charge upon the vessel, upon a libel to recover on a bottomry bond; and, also, with respect to a charge for commissions in procuring the loan, it being possible to raise the loan only through an agent (*The Yuba*, 4 *Blatch. C. C. R.*, 352; and *vide The Kathleen*, *supra*).

The consignee of a steamship arriving in a foreign port took the agency for the vessel; and she having been attached, and it

being necessary to relieve her from that attachment, so that she might sail as advertised, the master executed a bottomry bond to the consignee for the amount of the attaching claim, and also for advances. The Circuit Court of the United States for the eastern district of New York held that, inasmuch as the advances had been made without any agreement or reasonable expectation that they were to be secured by bottomry, the bond was invalid as to that item. That, although the design of the bond might suffice to sustain it, yet, as the master did not communicate with the owner, which he might have done by telegraph, he had no authority, and the bond was invalid (*The Circassian*, 3 *Benedict's D. C. R.*, 398).

The *Consolito del Mare* says that "the owners of the ship ought to contribute to the fitting out of the ship, according to their respective shares. If some of them are unwilling or unable to furnish their proportions, the captain may compel them, judicially, to do what is right; as he may also borrow money on their account, and pledge their proportions for the payment of the sum borrowed" (*Conso. del Mare*, ch. 46). And the ancient Teutonic Ordinance says that "where a merchant delays furnishing his part, the captain may borrow money on maritime loan and pledge the part of the recusant." And, again, it is said that "the captain may borrow at bottomry for those who are unable or unwilling to contribute their proportions of the expense of fitting out the vessel" (*Teut. Ord. Arts*, 11, 59). This is laid down as the rule where the vessel belongs to two or more owners.

The owner of the vessel as well as the master may pledge her by bottomry in a foreign port; and in this country bottomry bonds are frequently made by the owner himself in the home port. In one case it was held that a bottomry bond, given by the owner to the master to secure certain advances and wages due him was valid (*Miller v The Rebecca*, *Bee's R.*, 151).

There are cases in which an agent may take a bottomry bond. A ship, damaged on leaving New York, returned to that port. M., who had acted as agent for her owner, gave the owner notice of the accident, and of his intention to get the ship ready for sea again as soon as possible. The owner communicated with M. and with the ship's master, but provided no funds for the expenses. There was no evidence that the owner or master had credit at New York. When the ship was ready to sail, the master, not being able to pay for the expenses, advertised for a loan on bot-

bottomry; and M.'s offer being the lowest, the bond was given, and the court held that the bond was valid (*The Oriental*, 2 *Eng. Law and Eq. R.*, 546).

In a case which was decided by the Circuit Court of the United States for the second circuit, many years ago, and which has been before referred to, it was held that the owner in a foreign port, having an absolute control over his property, may pledge the vessel for money to purchase a cargo, and thereby create an admiralty lien. The facts of the case were these: In November, 1822, the owner of a vessel in Connecticut gave a bill of sale of her in the nature of a mortgage, but was suffered to remain in possession and act as absolute owner, and her register and all her papers remained unaltered. In July, following, he gave a bottomry bond for money advanced to purchase a cargo for the vessel in the West Indies, without notice of the mortgage to the lender. The court held that, upon common-law principles, the claim of the lender was to be preferred to that of the mortgagee, and affirmed the right of the owner to execute a valid bottomry bond for the purpose and under the circumstances appearing in the case (*The Mary*, 1 *Paine's C. C. R.*, 671).

A similar doctrine was laid down by the Supreme Judicial Court of Massachusetts at an early day. A bond was given by the owner for money, to run on bottomry on a ship and her freight for three years at twelve per cent interest yearly. The obligor was to pay the obligee, from time to time, half the ship's gross earnings, and to make other payments, if he chose, on the bond, and the interest was to cease on the amount of principal so paid; the obligee was to retain all payments so made, whether the ship should be lost or not, and the ship and freight were to stand hypothecated for the unpaid balance; and at or before the end of three years, the obligor was to pay the remaining sum due, with the stipulated interest, deducting such sums as the obligee would be held, by law, to pay for general average, etc., during the three years, as if he had been an underwriter; and in case of a total loss by perils insured against in a form of policy referred to, the obligor was to pay the obligee such salvage as he would be entitled to, if he had been the underwriter in such policy; and the obligor was to pay the obligee half the gross earnings not before paid over, deducting such sums as the obligee would be held to pay for general average, etc., as before mentioned. The obligor also gave a mortgage of real estate to

the obligee to secure fulfillment of the conditions of the bond. The court held that the bond was valid; and the fact that the obligee had attached the ship before the three years elapsed on another debt of the obligor, whereby the latter was prevented from employing her, was held not to excuse him from performing the conditions of the bond, it being his own fault that the other debt was not paid. It may be of some importance to note this latter holding (*Thorndike v. Stone*, 11 *Pick. R.*, 183).

The master would have no right to pledge the vessel for advances to purchase a cargo. But there is no such limitation upon the authority of the owner; he has the absolute control over his property, and has a right to pledge his vessel for money borrowed for any purpose, to be applied to repairs, outfits or other necessities, or to the purchase of a cargo (*The Panama*, *Olcott's C. C. R.*, 343). There seems to be no rule that, in order to constitute a bottomry bond as such, in the sense of the maritime law, it is necessary that the money should be advanced for the necessities of the ship, or for the cargo or for the voyage. Where such bond is given by the *master* in that capacity, it must, in order to have validity, be for the ship's necessities, for the implied authority of the master extends no further. But where the bond is given by the owner, as such, he may employ the money as he pleases. It is sufficient that the money is loaned upon the bottom of the ship at the risk of the lender for the voyage (*The Draco*, 2 *Sumner's R.*, 157; *Eneas v. The Charlotte Minerva*, 39 *Hunt's Merchants' Magazine*, 73).

A party who gives a bottomry bond upon a ship in the name and character of master, but was at the time or afterward became an owner, will not be permitted to restrict the rights of the bottomry holder, when he comes to enforce his bond, to those conferred by a bond made by the ship-master as such. Such party, it seems, takes all the benefits under the bond which would have accrued had it been executed avowedly by the owner. The holder of the bond is, upon the other hand, entitled to every advantage derivable from the fact that it was made by one possessing not only the authority of agent, but that of principal also (*The Panama*, *Olcott's C. C. R.*, 343).

One part owner cannot take from the master a bottomry bond to bind another owner's share for repairs (*Patton v. The Randolph*, *Gilpin's R.*, 457).

Either the owner or the master of a ship may bind her by a

direct hypothecation for repairs or supplies made or furnished in a foreign port, although a note or other obligation is given for the demand (*The Hilarity, Blatchford & Howland's Adm. R.*, 90). And a bottomry bond given by the owner is not rendered invalid by the fact that part of the loan consists of a bill of exchange drawn by the bottomry lender on the home port of the ship (*The Panama, Olcott's C. C. R.*, 343).

It may be stated that the terms bottomry and respondentia are often confounded as meaning the same security, but there is an essential difference between the two securities. There are three descriptions of the *usura marina* described in the books. 1st. Where the lender advances money on the ship, and this is called bottomry, and is to be repaid with certain interest in case the ship perform her voyage safely, in which case the ship itself is pledged to the lender as a security. In general, however, a bottomry bond binds not only the ship but her whole earnings. But a distinction is made between advances on freight and other advances. Sums advanced on account of freight must be deducted in preference to the bottomry (*Freight Money of the Anastasia, 1 Benedict's D. C. R.*, 188). The true definition of a bottomry bond, in the sense of the general maritime law and independent of the peculiar regulations of the positive codes of different commercial nations, is, that it is a contract for a loan of money on the bottom of the ship at an extraordinary interest upon maritime risks, to be borne by the lender for the voyage or for a definite period (*The Draco, 2 Sumner's C. C. R.*, 157). The contract of bottomry differs essentially from a loan with security, and is inconsistent with the existence of a lien such as is implied by the marine law to secure advances made to a master, in a foreign port, to enable him to make necessary repairs (*The Ann C. Pratt, 1 Curtis' C. C. R.*, 340). The essential difference between a bottomry and a simple loan is, that in the latter the money is at the risk of the borrower, and must be paid at all events. In the former, it is at the risk of the lender during the voyage, and the right to demand payment depends on the safe arrival of the vessel. The perils of the sea being at the risk of the lender, gives the right of reserving any rate of interest agreed upon, without incurring the penalties of usury (*The Mary, 1 Paine's C. C. R.*, 671; *The Atlantic, 1 Newbury's Adm. R.*, 514; *The William and Emeline, Blatch. & How. Adm. R.*, 66).

2d. Where money is advanced to be repaid in case the cargo arrives safe at the place of destination, and this is called *respondentia*, in which case, the cargo is pledged to the lender. And 3d. Where money is advanced to be repaid on the event of a certain voyage terminating favorably, but where the money is not advanced on the security either of ship or goods, and where it is immaterial whether the borrower have or have not any interest in either.

These are all maritime loans, but they depend upon different securities. In case of *bottomry*, the lender's security is upon the ship, and in case of *respondentia* it is upon the cargo, but the risks are the same, and the terms of the obligation are alike. *Bottomry* securities are invariably entered into by the owner or the master of the vessel, while those of *respondentia* are usually made by the owner of the cargo.

In case of necessity the master is authorized to hypothecate the cargo; that is to say, when he is not able to procure the requisite advances in case of necessity, upon the security of the ship alone, he may sell a part of the cargo, or hypothecate the whole. And it has been held that, if the master has money on board of the ship belonging to shippers, he is not bound to apply it to the ship's necessities before borrowing on *bottomry*, at least if unequal to the amount necessary to be realized. The law invests the master with a large discretion on the subject. Said Mr. Justice Story: "I am not prepared to say that there is any absolute rule which compels the master at all events, and under all circumstances, to make use of moneyed coin of third persons, which he happens to have on hand, in preference to any other mode of proceeding. The general principle is, that he is bound to act with a reasonable discretion. He is to get the necessary repairs done at as little sacrifice as is practicable. If he has money on board, and the use of that will be the least sacrifice, he ought to resort to it in the first instance. But there might be cases in which the use of such money would be the greatest sacrifice that could be made, and the whole object of the voyage might be thereby defeated. * * * In all these cases, therefore, much must be left to the master's discretion, and he must exercise it conscientiously for the general interest. If he acts *bona fide* and with reasonable care, the rights of the parties are bound up by his acts, although it should afterward be found that he had committed an

error in judgment, and might have acted more beneficially in another manner (*The Ship Packet*, 3 *Mason's C. C. R.*, 255, 258, 259). But where the goods of a shipper are thus disposed of by the master, the owner has a lien, by the general maritime law, upon the ship and freight for reimbursement. The *Consolito del Mare* (ch. 105, 106) recognizes the principle; and in general the money so lent upon a forced loan is deemed to be in the nature of bottomry (*The Gratitude*, 3 *Rob. R.*, 240, 264; *Belgin v. The Sloop Rainbow*, *Bee's Adm. R.*, 176). This doctrine is unquestioned.

Doubtless a lender on bottomry is not bound to see to the application of the money he advances, but it is clear that he must make due inquiry to ascertain that an unprovided necessity exists, and that without money so advanced the ship cannot proceed on her voyage; accordingly, where, without such previous inquiries, advances were made on bottomry to the master of a ship which had arrived with a considerable cargo in a foreign port, and remained there two months, the repairs, which were unimportant, having been completed, and her stores furnished before the advance, although there was no fraud on the part of the bondholder, yet, as there was no real necessity for borrowing at maritime interest, the bond was not supported (*The Oralia*, 3 *Hagg. Adm. R.*, 75). But where repairs are necessary, it is not incumbent on the foreign merchant, before he advances the money on bottomry, to calculate the expediency of incurring the expense of them (*The Vibilia*, 1 *Rob. R.*, 1).

The two securities of bottomry and respondentia, are in many of their essentials substantially alike, and they are, therefore, oftentimes considered as classed together.

CHAPTER LVIII.

WHAT MAY BE PLEDGED IN A MARITIME LOAN — WHAT MAY BE LENT AT MARITIME RISK — LOAN, HOW TO BE EMPLOYED — CONSEQUENCE IF THERE HAPPENS TO BE NO RISK — THE CASE OF A FRAUDULENT BORROWER — PROOF OF THE SHIPMENT — LOAN, HOW EMPLOYED.

As a general rule, everything which can be insured may be the subject of a contract of a maritime loan, provided that the maritime risk and the subject of it be real on both sides, and that there be nothing repugnant to the nature of the contract.

The contract on marine loan on the cargo affects not only the goods on board, at the time of departure, but all which may be taken on board for account of the borrower during the voyage. If the contract be for the outward and inward voyage, it covers the returns for account of the borrower. But it has been held by the French admiralty courts, and such doubtless is the law, that the lien does not attach upon merchandise which the borrower voluntarily, and without being compelled by necessity, ships in another vessel. To the risk of this merchandise the lender is a stranger, even though it be the returns of the first cargo, and hence no substantial reason exists why the lien should attach upon such merchandise thus circumstanced. It is enough, however, that the subject of the risk is on board the vessel at the time of the accident. If it is not, the borrower is not released from his personal obligation by the loss.

It seems by the ancient usage that "money may be lent at bottomry on the body and keel, the rigging and apparel, arms and victuals, *jointly* or *separately*, and upon the whole or part of the cargo, for the entire voyage or for a limited term." It has been suggested, and very properly, too, that the words *jointly* or *separately* should be placed at the end of the article; because nothing prevents a person from borrowing *jointly* on the ship and cargo, if he has an interest in them.

When the captain or owners of the vessel ship goods and merchandise for their own account, they may take up money at maritime risk on the vessel and goods jointly; because they have the disposal of both, and the lender thereby has a more extensive lien.

To borrow money at maritime risk on freight to be carried by the ship, is not sanctioned. M. Valin observes that the lender

would be at the mercy of the borrower, who would make no exertions to save freight when it would yield no advantage to him. He adds that it is lawful to borrow money on freight *already reserved*; that is to say, to borrow for the purpose of paying a stipulated freight, which is to be paid at all events, whether it be for the transportation of merchandise or for a mere passage. The *Guidon de la Mer* permitted the master "to take up as much money as the amount of the primage and that money which was promised to him in the charter-party, in consideration of the advances which he may make to the crew. The advances to seamen is one of the expenses of equipment and outfit. It may, therefore, be the subject of insurance, and of a contract of maritime loan for the benefit of those who fit out and equip the vessel" (*Guid. de la Mer*, ch. 19, art. 7).

It would seem that seamen are at liberty to borrow money on merchandise laden for their own account, because they are considered *pro hac vice* as owners. They require no permission from any person in that case. But as mariners are restricted from insuring their wages, so they may not borrow money at maritime risk on that fund (*Emerig, des. Ass.*, ch. 8, § 10). The reasons for this law flow from the necessity of securing the attention of mariners to the safety of the ship, and these reasons would seem to apply with equal force to both contracts.

Money procures those things which persons desire to send out to sea, and without that necessary article a vessel could not leave her port. This is the reason why privileges so extensive are given to maritime loans. But when the vessel has put to sea, the public interest is subserved, and it is not necessary to grant particular privileges to an enterprise already executed. Still, after the departure of the vessel, nothing prevents the borrower from contracting to pay the money borrowed out of the interest which he has at stake; but this indication of a particular fund does not give the creditor any lien upon the fund thus pointed out. The money cannot truly be termed *trajectitia* but when it has been employed in the actual purchase of the goods shipped or has enabled the borrower to purchase them.

With respect to the article which may be lent at maritime risk, there seems to be no doubt that merchandise or other effects may be the subject of a maritime loan as well as money. The civilians require only that the effects lent should be designated by weight,

number or measure; and that that should be of such a nature, according to the custom of the place, that they may be considered, or be intended, for sale by the borrower, who becomes the owner on condition of paying the price, and a maritime interest in case of the safe return of the vessel (*Stypmannus, part 4, ch. 2, n. 18*).

Pothier says: "In order to form a contract of maritime loan, there should be a sum of money borrowed by one from another on conditions specified in the contract. It is not meant that nothing but money may be the subject of this contract; for this contract includes that of *mutuum*, to which is added an agreement, by which the lender takes upon himself the risks; he may require all those obligations which are contained in the contract of *mutuum*; that is, of all those *quæ pondere, numero et mensura constant, et quæ usu consumuntur*. But it is not usual to lend anything except money in a maritime loan" (*Pothier, n. 8, h. t.*).

The contract of *mutuum*, or loan of things to be restored in kind, referred to by M. Pothier, is a covenant by which one gives to another a certain quantity of the kind of things that is given by number, weight and measure, such as money, corn, wine, etc., on condition that the borrower shall restore, not the same individual thing he borrowed, but as much of the same kind and of the like quality.

But it seems well settled by the authorities that everything may be lent in a maritime loan as well as money; and it would seem that this contract may be united with another, and that the contract is susceptible of any modifications which the parties may think proper to make (*Vide Emerigon on Marit. Loans, 139-141*). And it seems, from the same authority, not only that any other article than money may be the subject of a maritime loan, but that it is even permitted to stipulate that the lender shall continue to be the owner of the articles lent and at his risk; in which case, two contracts would be embraced, which, being united, form a *hiring at maritime risk*.

It has been shown that maritime risk is the essence of the contract of maritime loan. It is necessary, therefore, that the money should be actually applied to the purpose for which it was borrowed. If it be not so employed there is no risk, and, hence, the contract can have no existence as a maritime loan, and may be rescinded. And, yet, it has been declared by judicial authority that the lender on bottomry is not bound to see to the application

of the money he advances, although he must make due inquiry to ascertain that an unprovided necessity exists for the advance, and that without it the ship cannot proceed on her voyage (*Vide The Oralia*, 3 *Hagg. Adm. R.*, 75). The non-departure of the ship gives an equal right, according to circumstances, to the rescinding of the contract; but after the risk is once commenced, the contract should have every effect which the circumstances will warrant.

The maritime interest is the price of the risk; and if there has been no risk it follows that no maritime interest can be due to the lender. Says M. Pothier: "Suppose there has been no risk in consequence of the voyage having been broken up? In this case, the borrower would be obliged to return the money lent to him; but he would not be obliged, also, to pay the sum which he had promised by way of maritime interest. For the maritime interest being the price of the risk which the lender ought to encounter, he would not be entitled to maritime interest for the effects upon which the loan was made, if they never had been at hazard; and he cannot be entitled to the price of a risk, who never has incurred it. The condition that there shall be risks to be encountered, is one that is necessarily included in a contract by which the borrower has agreed to pay the price of a risk" (*Pothier*, n. 38, *h. t.*). And, again, the learned author remarks: "The maritime profit is not due to the lender, even in cases where the voyage has been broken up by the act of the borrower. For, let the case be what it may, it is enough that the voyage was broken up; the lender has run no risk for which he would be entitled to a maritime interest; he cannot demand the price of a risk which he never encountered" (*Pothier*, n. 39).

And Valin says: "We do not make any difference between the borrower in a maritime loan, who has had it in his power to load the ship, and him who could not do it. Let the lender have acted with ever so much good faith, we must always recur to principles for the solution of any question on the subject; for the nature of the contract is such that the lender could not be entitled to any maritime profit but as far as he has incurred the risks to which the contract is subject. In the case of not lading the vessel, he has run no risk; and, therefore, no maritime profit can have been earned. Whether the borrower was able to ship is of no consequence" (*Valin*, art. 15, *h. t.*, p. 16).

In those cases where the voyage is broken up before the commencement of the risk, the borrower is bound simply to return the amount of the loan with legal interest, according to the custom of the place.

It sometimes happens that the borrower fraudulently obtains more money than the security which he gives will adequately cover. Upon this subject, the French ordinance forbade "persons to borrow by maritime loan upon the hull and keel of the ship, or upon the cargo, beyond their value, under pain of being obliged, in case of fraud, to pay the whole sum, notwithstanding the loss or capture of the vessel." According to this, he who has fraudulently borrowed money, by maritime loan, beyond the value of the thing at risk, must pay the whole sum borrowed, notwithstanding any accident. And it is well settled by competent authority that, if the ship arrive in safety, the fraudulent borrower cannot avoid the payment of legal interest. His deceit imposes silence upon him, and he is not allowed to demand that the contract be rescinded (*Emerig. Traite des Assurances, ch. 16, § 5*). In such case the owners would be obliged to pay the money with maritime interest for sums borrowed by the captain at maritime risk in the course of the voyage, because they are responsible for his acts, and they represent him at least until they abandon the ship and freight.

From some rules which have been laid down in respect to the proof of the shipment of the goods on which the money was loaned, it has sometimes been contended that it is lawful to borrow when the thing is already at risk; and that in case of accident it is sufficient to prove that the subject of the risk was on board when the loss happened. This is the rule as to insurers, but not as to lenders at maritime risk, who cannot be considered in that character, unless they have made a loan to effect the equipment, to purchase the cargo, or to supply the necessities of the ship during her voyage. The nature of the contract and good faith will not allow that the interests of third persons should be injured without a good and lawful cause; such, for instance, as those of the lenders for the equipment of the ship and furnishing the cargo, which would be thus injured by a concurrent and not equally meritorious claim, and those of the insurers, who, in case of loss, would be deprived by an intruder of this proportion of the effects saved.

The French *Ordinance de la Marine* declares that "the person who shall have borrowed money by maritime loan

on goods, shall not be released from his contract by the loss of the ship, unless he prove that he had goods on board to the amount of the sum borrowed" (*Ordinance, art. 14, h. t.*). M. Valin remarks that, in such a case, the proof of property should be the same as in cases of insurance (*Emerig. Traite des Assurances, ch. 11*). But it suffices if the borrower prove property on board to the amount of the sum borrowed, as before stated, without being obliged to run the risk of any portion thereof; for borrowers are frequently men of no fortunes and have nothing but their industry to depend upon. Targa, however, expresses the opinion that the borrower should run the risk of a third part of the thing borrowed (*Targa, ch. 33, n. 16, p. 148*). But this seems not to be correct.

The Circuit Court of the United States for the first circuit, held by Mr. Justice Story in 1826, made a decision involving this question to a certain extent. In a respondentia bond for \$10,000 on goods, it was stipulated that the vessel should carry goods to the value of the amount lent. The vessel was lost on the voyage, having goods on board to the value of \$9,000 only. The lenders seized on the bond, and claimed payment of the amount loaned, because the full amount of goods were not on board. The court held that this act was not a condition precedent, the omission of which was sufficient to justify a recovery for the whole loan, but that the lenders were entitled to recover the difference in amount between the sum lent and the sum on board at the time of the loss (*Franklin Insurance Company v. Lord, 4 Mason's R., 248*). This would seem to be a slight modification of the old French doctrine, as expressed in the ordinance and laid down by the elementary writers.

It is not necessary that the borrower should expend the money which he has borrowed in merchandise at the place where the contract was made. He may carry it with him, in order to make a more advantageous use of it during the voyage. This was the common practice among the Romans, and the right is recognized by the French authors. It is sufficient that the money was exposed to the perils of the sea to make the maritime interest due, and on the other hand the borrower will be released from his bond by proving the property to have been on board at the time of the loss.

Nor is it necessary to show the particular manner in which the money was employed. It is enough to prove that at the time of

the loss he had property on board to the value of the sum borrowed (*Emerig. on Marit. Loans*, 156, 157). The proof of the application of the money lent at maritime risk is never thrown upon the lender. It is sufficient for him to exhibit his contract to the person who has received his money or his agent (*Casaregis, Disc. 1, n. 37; Pothier, n. 52*).

The Supreme Court of the United States have held that it is not necessary that a *respondentia* loan should be made before the departure of the ship on her voyage, nor that the money loaned should be employed in the outfit of the vessel, or invested in the goods on which the risk is run. And it was declared that, if the risk of the voyage be substantially and really taken, if the transaction be not a device to cover usury, gaming or fraud, if the advance be in good faith for a maritime premium, it is no objection to it that it was made after the voyage was commenced, nor that the money was appropriated to purposes wholly unconnected with the voyage. It was further suggested that the lender is not presumed to lend upon the faith of any particular appropriation of money; and if he were, his security could not be avoided by any misapplication of the fund, when the risk was incurred in good faith upon other goods.

Mr. Justice Story delivered the opinion of the court, and, among other things, said: "The form of the *respondentia* bond in the present case is, as far as we know, the common and usual form. The only deviation from the actual facts is, that it seems in some of its provisions to contemplate the voyage as not then commenced. This probably arose from using the common printed form, which is adapted to that, as the ordinary case. But it misled no one, and was certainly perfectly understood by the parties. The risk was taken for the whole voyage, precisely as if the ship had been then in port; and if, before the bonds were given, the property had been actually lost by any of the perils enumerated in it, it is clear that the loss must have been borne by the lenders. They could not have recovered it back, since the event was one within the scope and contemplation of the contract. The safety, then, of the property at that particular period does not vary the rights of the parties, and from the very motive of the transaction it must have been entirely unknown to both whether the ship was at the time in safety or not. They entered into the contract upon the usual footing of policies of insurance; lost or not lost. So far as

this deviation from the fact bore upon the point of good faith and reality of the contract as a genuine maritime loan, it was left to the jury to draw such inferences as upon the whole circumstances they were warranted to draw" (*Conrad v. The Atlantic Insurance Company*, 1 *Peters' R.*, 386, 437).

CHAPTER LIX.

RISKS AND LOSSES BORNE BY THE LENDERS IN CASES OF MARITIME LOAN — LOSSES AND AVERAGE OCCASIONED BY THE PERILS OF THE SEA — LENDERS BEAR ONLY THE RISKS OF THE SEA — LOAN FOR THE VOYAGE OR A LIMITED TIME — PLACES OF PERIL AND CHANGE OF THE SHIP.

CLEIRAC observes that the contract of maritime loan is subject to the same risks as the policy of insurance (*Notes on le Guidon de la Mer*, ch. 18, art. 2, p. 331). Valin and Pothier both adopt the same rule, but admit certain exceptions to which it is liable (*Valin*, art. 11, h. t., and art. 6, tit. *Des Assurances*; *Pothier*, n., 16, h. t.). The *Guidon de la Mer* decides that maritime money does not contribute to any particular average (Ch. 19, art. 5). And by the law of England and of this country there would seem to be neither average nor salvage upon a bottomry bond. The lender at maritime risk is not bound to contribute to any simple average or particular damage which may happen to the merchandise unless there is a stipulation to the contrary. Thus, in order to charge the lender with particular average, there must be an express agreement to that effect, while the insurer is obliged to contribute, if he has not protected himself by a special clause to the contrary (*Vide Emerig.*, *Traite des Assurances*, ch. 12, §§ 39, 40).

Pothier illustrates the reason of this difference. He says that "the insurers bind themselves to indemnify the insured against every loss and injury which their property may suffer from the perils of the sea; but in a maritime loan the lender enters into no obligation to the borrower" (*Pothier*, n., 42 and 47). And it may be added that the safe arrival of the vessel is the essential and characteristic condition of the latter contract, and simple average has no influence on the accomplishment of this condition.

The lender, therefore, is a stranger to it, unless he has made himself liable by a special agreement.

The *Guidon de la Mer* says that "bottomry money must contribute to ransoms, compositions and jettison made for the safety of the whole, and for the release or avoiding of damages" (*Ch. 19, art. 5*). The reason of this difference between simple and gross average is this: Simple average, which is occasioned by accident and without the fault of man, contributes nothing to the fulfillment of the contract and the safe arrival of the vessel; on the contrary, without the aid of ransom or jettison the ship would never return.

Says M. Prevôt de la Jannes: "The lenders ought to contribute to discharge the borrowers from gross averages, such as ransoms, compositions, jettisons for the common safety of the vessel and cargo; for it is no more than a loss that they suffer for the preservation of their money, which, without this, might have perished with the vessel" (*Principes de la Jurisprudence François, tit. 20, n. 556*).

Where repairs are ordered by the underwriters, for the payment of which a bottomry bond is given, and they refuse to pay it on the arrival of the vessel, in consequence of which she is sold, they are liable for all the damage which occurs to the owner in consequence of that refusal. Where a ship has been repaired, the underwriters are not entitled to the usual deduction of one-third, new for old, unless the ship has been put into the free possession of the owners again. Where a ship is obliged to put into port for the benefit of the whole concern, the charges of loading and unloading the cargo and taking care of it, and the wages and provisions of the workmen hired for the repairs, become general average (*Da Costa v. Newnham, 2 Term R., 407*).

It would seem, from principle, that a lender upon bottomry ought not to be allowed to stipulate that he shall be exempt from gross average; and this seems to be the opinion of both Valin and Pothier (*Pothier, n., 46*). Such an agreement would probably be held to be absolutely void, and rejected, because it is contrary to natural equity, and even to the interest of the lender, to whom everything would be lost if the vessel perish (*Pothier, n. 46*).

It has been before asserted that the safe arrival of the vessel is the essential condition and characteristic feature of the contract

of maritime loan. Consequently this condition should be scrupulously preserved. To make the contract lawful, the money must be at the risk of the creditor. If the ship perish before she arrives in port or previous to the expiration of the limited time, the condition has not been performed, and consequently the expectations of the lender vanish. This is the reason assigned why the French ordinance decided that "every contract of maritime loan shall become void by the entire loss of the thing pledged in the loan, provided that it happens within the time and place of the risk."

It seems to be sufficient, then, that the entire loss shall happen within the time and place of the risk in order to render the contract void. It would really seem to be intolerable if the borrower, after having lost his property by an accident within the time and place agreed upon, should be obliged to pay the whole principal, with maritime interest, under pretense of an agreement which was radically void and usurious. And from a very early day the French Admiralty Courts have disregarded stipulations in contracts of bottomry that the lender shall be exempt from what is called gross average in case of damage to the merchandise or ship covered by the contract.

The lender upon bottomry or respondentia bears no risks than those of the sea. He is not responsible for accidents which may happen from the internal defect of the thing—as if the commodities rot, if the liquors leak out of the casks, if, from length of time, dry-goods get heated, or if the vessel become unseaworthy by age. And it has been held by the English courts that where a ship's bottom is injured by worms in the course of the voyage, so that, in consequence thereof, she is incapable of completing the voyage and is condemned, the loss is not a loss "by perils of the seas" (*Rohl v. Parr*, 1 *Esp. N. P. C.*, 444).

The lender is not responsible for any accidents which happen through the acts of the owners of the vessel, the master and mariners, or shippers. It is not a peril of the sea at the risk of the lender, if the voyage be changed by order of the owner, or a loss has happened by barratry or the fault of the merchant (*Roccus, de Nav. n.* 51). If the effects be forfeited in consequence of their being contraband, in which the lender has not participated or of which he was ignorant, he does not suffer from this accident, because it is not a peril of the sea (*Stypmannus, part 4, ch. 2, n.*

105). But if the design of smuggling or trading in contraband was evident from the contract, the loss would fall upon the lender (*Kuricke, tit. 6, p. 362*). And if any other shipper than the borrower be the occasion of an accident by his own act, without the borrower being able to prevent or repair it, this would be a *vis major* and an accident at the risk of the lender, provided it occurred at sea and was not the subject of particular average.

If the goods remain unsold at the place where they are exported, if they be sold under the limited price or to an insolvent person, or if they are pillaged, burnt or the like, the lender is not affected by such accidents, because they are perils of the land and not of the sea (*Stypmannus, part 4, ch. 2, n. 204, p. 585*).

Among the Romans, money lent on maritime interest and risk was given either for the whole voyage, that is, out and home, or only out, or only on the return voyage, or for a limited time; and this is in accordance with the doctrine of the American courts. It has often been held in this country that a bottomry bond is equally valid, whether made for a definite period of time or for a specified voyage (*Vide The Draco, 2 Sumner's R., 157; Eneas v. The Charlotte Minerva, 39 Hunt's Merchant's Magazine, 73*).

The old French ordinance upon this subject declared that if "the time of the risk be not stipulated in the contract, it shall commence, as to the vessel, when she hoists sail, and continue until she drops anchor in her port of destination; and as to the cargo, as soon as it should be laden on board of the ship or of the lighters to be carried thither, and continue until it be delivered on shore" (*Marshall on Insurance, 656*). According to this, the voyage which the vessel makes, from her departure until her arrival at the port of destination, whether it be out or home, constitutes what is called the entire voyage, to distinguish it from the voyage for a limited time.

It is very common to borrow money at gross adventure, or at maritime risk, for the voyage out and home, whether it be on the vessel or the goods. In this case, the risk commences at the place of equipment or lading, and does not end until the vessel has returned to the same place. Under the French ordinance, just referred to, if the time of the risk was not regulated by the contract, it appears that the presumption was that the money had been lent only for the outward voyage. M. Pothier was of the opinion that, in doubtful cases, the contrary presumption should

be indulged, which seems to be, in effect, analogous with the nature of a contract of *return voyage*, and in accordance with the daily practice. Perhaps, in a majority of the cases, the maritime money is to be repaid on the safe return of the vessel to the port of outfit. But it is all a matter of intent of the parties, to be gathered from the contract, which, in such cases, is ascertained without difficulty or doubt. The rule of the celebrated ordinance of Louis XIV, upon the subject, seems to have been copied into the Napoleon commercial code, although it was thought that the extension of French commerce demanded a new marine ordinance, which, by investigating the nature of things and their various relations, might prevent litigation and give stability to the jurisprudence of the empire. But, as before suggested, Bonaparte's legislators adopted the old rule, which had been in force for over a century, without amendment or improvement (*Code du Commerce*, No. 328).

Of course, losses which happen during the existence of the risk are borne by the lender. But when the voyage has ended, or the time limited has elapsed, the risk ceases, as to the lender, and the maritime interest becomes due (*Pothier*, n. 36; *Valin*, art. 11, p. 13). Contracts of this nature are sometimes for a specified period, and *pro rata*, not exceeding, for example, one year. In such a case the term is limited to one year, at the expiration of which the risk ceases, as to the lender, and his principal and interest then become due. And it may be added that the terms of the clearance are of no consequence to the lender in estimating his risk. In some countries, for example in France and Holland, vessels are sometimes cleared out for one or two years, without designation of places which they are to visit. These voyages, in France are called *en caravan*; and the vessels go from port to port in quest of freight or of profits until the time limited for their return. The practice has been expressly sanctioned by the English courts (*Vide Gienar v. Meyer*, 2 H. Black. R., 603). In Italy they sometimes lend at gross adventure for an unlimited time, without designating the voyage. In such a case it depends on either of the parties to terminate the contract when he thinks fit, provided it be done at a proper time and under proper circumstances (*Targa*, ch. 33, n. 11, 12, 14, 15, p. 145). The same custom prevails in some other countries, and there does not seem to be any reasonable objection to the practice.

The course of the time limited is not interrupted by a demurrage or delay in port during the route, because, whether the stay be voluntary or forced, it is possible that the ship may perish by the perils of the sea (*Stypmannus, part 4, ch. 2, n. 80, p. 383*). In order that a delay may suspend the time, there should be an express agreement to that effect; but such stipulations are not common, except in charter-parties of affreightments or articles of associations for privateering. And it seems that a special agreement is equally necessary to justify a deduction, for the time during which a vessel is laid up for refitting or otherwise, from the term limited by the contract, unless, from the circumstances of the case, the laying up of the vessel be considered as a general average. The law would be the same as to demurrage occasioned by a fear of enemies or pirates (*Emerig. on Marit. Loans, 175*).

A ship which is not heard from is presumed to have perished within the time limited, at least, until the borrower proves the contrary (*Valin, art. 13, h. t.*). As soon as the peril commences a lender has an undeniable right to the whole interest, although the peril should be abridged or lessened.

The French ordinance of Louis XIV did not provide for the case of money lent *for a limited time with a designation of the voyage*, but declared that then the voyage designated would be the principal object of the contract and the time merely accessory. And Targa adds that it would be just that the borrower should arrive at the place of his destination in order that he may be in a situation to pay the principal and interest (*Targa, ch. 33, n. 13, p. 146*). Doubtless the time was added, not as a period for the transaction of the risk against the lender before the voyage ended, but as a measure for the increase of interest in proportion to the length of time beyond the period stipulated. Contracts of maritime loan are sometimes on a voyage out and home, at a certain per cent per month. In such a case the interest is not due until the end of the voyage. But if the ship perish, the lender has no claim.

Valin says that "usurious lenders have invented a way of indemnifying themselves in a case where the vessel does not return within the ordinary time, by stipulating that if she does not return by a certain period, they shall receive interest at the rate of one-half per cent per month both on the capital and the maritime interest" (*Valin, art. 2, h. t., p. 5*). But since they are

allowed to stipulate for any rate of interest that they think proper, it is not easy to see any good reason why they should be prevented from augmenting an interest already due in a case where the vessel does not return within the time limited.

In respect to the places of peril and change of the ship, it may be affirmed that the lender is not responsible for any loss which occurs out of the places designated in the contract, except in cases of deviation occasioned by necessity or the perils of the sea (*Pothier, n. 18*). A voluntary deviation discharges the lender from the consequence of any ulterior peril, although the ship return to her legitimate track (*Emerig. Traite des Assurances, ch. 15, § 16*). The lender is not answerable for a change of the ship without necessity. Losses occurring in any other ship than that which is designated in the contract do not affect his rights. But if the change of the ship be of necessity from the perils of the sea, the lender must bear the risk of the substituted vessel. For instance, if the first vessel is taken for the service of the king or the government, or is declared unseaworthy, or is wrecked, the borrower, whose goods have been landed before the accident, may ship them or their returns in another vessel at the risk of the lender; and it may be remarked that the additional freight which may have been paid to the substituted vessel is a gross average, which is chargeable to the lender. At least, such is the doctrine of the French ordinance, and the English law seems to be similar (*Marshall on Insurance, 656*).

CHAPTER LX.

THE NATURE OF BOTTOMRY BILLS — WHERE AND IN WHAT MANNER MARITIME MONEYS ARE TO BE PAID — LIMITATIONS OF ACTIONS FOR THE RECOVERY OF THE SAME — RULE IN RESPECT TO SECURITY IN SUCH CASES — EXTINCTION OF THE CONTRACT OF BOTTOMRY — CASES ILLUSTRATING THE SUBJECT.

THE term, *bill of gross adventure*, used by the French, is very comprehensive in its nature, and has found its way into the legal language of England and the United States. As the term is used by the French, it is sufficiently comprehensive to include every instrument of writing which contains a contract of bottomry,

respondentia, and every other species of maritime loan; and there seems to be no other term of similar import in use in the English language.

Bottomry bills are often referred to in the books and are well understood. With respect to these bills, they are considered to be negotiable where they are made payable to the owner or the bearer, as is often the case; therefore, they may be indorsed and delivered from one to another. Against the bearer of such a bill a set-off will not be entertained of a debt due from the original creditor himself, because in such a case the indorsed bill must be considered as if it had been drawn in favor of the bearer himself. But if the bill had not been drawn *payable to order*, then the drawer would be entitled to the same exceptions or set-off against the bearer that he would have had against the original payee, because in that case the indorsement has no other effect than the assignment of a mere chose in action. It would be the same if the bill were not expressed to be *for value received* or *in merchandise*, because in such a case the indorsement is a naked authority to receive the amount.

The holder of a bottomry bill, who has paid its value, becomes the owner of it. He incurs the maritime risks, and the maritime profits belong to him. On the return of the ship, if the borrower be insolvent, the bearer of the bill is entitled to an action of guaranty against the indorsor, in the same manner as the bills of exchange or negotiable notes. This has been the doctrine since the days of Casaregis, and has not been questioned since (*Casareg, disc.* 55). But this guaranty, according to the same author, extends no further than the principal sum, although it also covers the cost of protest and common legal interest from the time of the protest; but not the maritime interest, for the indorsement is not a guaranty of the contract. In short, the guaranty here spoken of would not take place if the indorsee should take the bill at his own risk and without recourse. This depends on the agreement of the parties (*Vide Emerig. on Marit. Loans*, 183, 185).

When the risk is ended, the borrower must pay the principal and maritime interest in money. An offer of merchandise in payment would not answer the contract (*Pothier, n.*, 242, 530). And payment should be made in money which is current at the place where it is made payable. The borrower having received money on the goods or the vessel, it has been thought to be just that a

little time should be allowed after the arrival of the vessel for the collection of the freight or to sell the merchandise, so that he may be able to fulfill his obligations. In some countries it is customary to allow a specified number of days; and the legal interest does not commence until that time has elapsed. Emerigon thinks that if the contract do not provide for any days of grace, a reasonable time should be allowed to the borrower to enable him to raise funds. Indeed, he expresses the opinion that time should be allowed, even if it be stipulated in the contract that the payment shall be made immediately on the arrival of the vessel (*Emerig. on Marit. Loans*, 185). It would be well for the parties to make such stipulations in their contracts in this regard as to them may be thought convenient, although it is doubtless in the power of the judge, in all these cases, according to equity and the circumstances of the case, to grant a certain delay, which, without injuring the creditor, will enable the debtor to pay the debt, saving the common legal interest, which runs from the time when the debt became due, and not merely from the time the action was commenced. If the money was lent for the outward voyage or for a limited time, the principal and maritime interest ought to be paid at the place where the stipulated risk ended, although the voyage be not completed, and the same should be paid to the creditor or his appointed agent (*Styp.*, part 4, ch. 2, n. 90, p. 384). But if, at the place where the stipulated risk ends, there be no person to whom the principal and interest can be paid, the borrower may make a judicial deposit of it or carry it with him. In the latter case, legal interest will not be chargeable until his arrival, but the money or effects which he embarks will be at his own risk (*Loccenius*, lib. 2, ch. 6, n. 10, 11). And if, in order to fulfill his engagement, he voluntarily draws bills of exchange, they are on his own account, unless they are drawn by the order of the creditor; and an agreement that the bills of exchange should be at the risk of the borrower would be inconsistent with the nature of the contract, and usurious; for it is sufficient if the borrower pay the principal and interest at the place where the term expires, without permitting him to place himself in a worse situation.

By the French *Ordonnance de la Marine*, the borrower might apply to the judge of the place where the term expired for permission to make a deposit, and the other party was also at liberty to commence an action before the same judge for what was his

due. In France, in most commercial cases, the court before which the suit is first brought may order, by its judgment, that the money shall be paid provisionally, any appeal notwithstanding; the party to whom the money is paid giving security to refund, in case on an appeal the judgment shall be reversed; although it would seem that such provisional orders cannot be made in cases of maritime loans, as they are not among the enumerated cases for which this remedy is provided (*Vide Emerig. Marit. Loans*, 187, note).

By the old statute of Marseilles, adventures shipped on a joint concern and maritime loans, the acting partner could not be called upon to account after the expiration of four years from the return of the ship, but it was decided that this limitation did not apply to maritime loans under the *Ordonnance de la Marine*, because the latter ordinance established no such limitation. In this country, it has been held that there is no limitation of action against the original owner of property found derelict at sea, unless there be proof of an intention to abandon wholly (*Wilkie v. Brig St. Petre, Bee's Adm. R.*, 82). But by a late case, decided by the United States Circuit Court for the first circuit of Massachusetts, it is held that, if proceedings for enforcing a bottomry bond are instituted *within a reasonable time*, the *lien* will not be affected merely by the departure of the vessel from the return port, with or without the knowledge of the holder (*Burke v. The M. P. Rich*, 1 *Cliff. C. C. R.*, 308). In respect to security given with a bottomry bond, the ordinary rule would require a degree of diligence in prosecuting the claim; especially so in so far as the same may affect third persons.

It may be affirmed, however, that in general the security is bound by the same obligations to the lender as the borrower himself, unless there is a particular clause to the contrary in the contract (*Pothier, des Oblig.*, n. 404, p. 198). This is the doctrine of Casaregis, as well as of Pothier (*Casag., Dis.* 63). The security is bound to pay the principal and interest, not only in case of the safe arrival of the ship, but, it would seem from the decisions, if the ship do not return; that is to say, such would appear to be the rule, provided the *goods* on which the money was lent are *saved*, or were secured on shore before the loss of the ship. And the security is bound, *ipso jure*, to pay legal interest from the time of delay of payment. But "those who have been

security for money lent at profit are discharged on the completion of the voyage, if the creditor leave the principal in the hands of the debtor for another voyage without their consent" (*Guidon de la Mer.*, ch. 19, art. 2, p. 335). And one author says: "The security is discharged, although the new contract be imperfect and insufficient to cancel the first obligation of the debtor; as in the case of a renewal or tacit continuance of a lease after the expiration of the stipulated term, and other similar cases, where it is evident that the security is bound" (*Boutarie Inst.*, pp. 460, 482, 507).

In respect to the question as to whether the security is responsible in case of the loss of the ship, where it appears that the borrower has fraudulently borrowed more at maritime risk than the value of his interest, there appear to be decisions both ways. In such cases the borrower is personally responsible to the lender, and the *Guidon de la Mer* allowed an action against the borrower and his pledges jointly in all cases where an action would lie against the borrower (*Guidon de la Mer*, ch. 19, art. 8). And the same doctrine was maintained by Casaregis (*Casareg.*, dis., 62, n. 37). On this principle the security would be responsible in the cases supposed, and the latter opinion is certainly in favor of this doctrine. If the ship perish, he who has borrowed beyond his interest is presumed to have had nothing at risk. This was the presumption established by the ordinance before referred to, and it was regarded as *juris et de jure*. The contract is thus declared null, and hence it would be just that the security should be answerable, and that he should pay the same with legal interest; and the more so, because in general the security is the partner of the borrower. The important part of commerce which is carried on by means of the contract of maritime loan would languish extremely in consequence of the little confidence that is placed in seafaring persons, if the hand of the security were to be weakened by exceptions which are contrary to the spirit and nature of the contract. Thereupon, the decisions holding the security holden in such cases is never generally approved.

In respect to the extinction and nullity of the contract of maritime loan, it may be remarked that in such loans two kinds of nullity are recognized; the first, where the contract contains some internal defect, which makes it illegal in its very commencement; and the other, where it becomes void by the loss of the things upon

which the loan was made. The latter does not affect the existence of the contract, considered in itself. It releases the borrower from his personal obligation by reducing the contract to the value of the portion which may have been saved. This is a condition which operates as a release of the borrower, who is only obliged to pay in case of the safety of his property. By the French ordinance it was declared that "all contracts of maritime loan shall become void upon the loss of the thing upon which the loan was made, provided it happened by accident, within the time and place of the risk;" and it was added, in another article, that "in case of wreck the contract shall always be reduced to the value of the goods saved." There is no doubt that the contract becomes void by the loss of the ship on the voyage. "Such is the nature of the contract of maritime loan, that if the thing upon which the loan is made perish by accident, the contract is of no effect, and the lender can claim nothing. This is what is meant in the eleventh article, where it is declared that the contract shall be void in this case. It is also the common law of the nations of Europe" (*Valin*, 12; and *vide Clairac, sur le Guidon, ch. 18, art. 2, p. 331*). "The condition of the contract of maritime loan, and the obligation of the borrower which it contains, exist when the thing on which the loan is made remains on board during the whole term without being captured or lost, whatever damage they may suffer from mere accidents of *vis major*. And the borrower is obliged, in this case, to pay the whole sum lent, with maritime interest, without claiming any deduction on account of the deterioration which his goods may have suffered" (*Pothier, n. 42*). But in case of wreck or any other accident of *vis major*, the contract is void, and is reduced to the value of the things saved. If a capture, shipwreck, foundering, stranding, and the like, take place, it is a legal total loss. There remains nothing but the salvage. The personal obligation of the borrower is extinct. The lender has nothing but an action *in rem* on the salvage, and the contract is reduced to the value of the effects saved.

M. Pothier observes: "We have seen that the arrival of the thing upon which the loan was made, whatever damages it may have suffered, by what accident soever of *vis major*, preserves the obligation of the borrower, who must pay the sum lent and the maritime interest. What if only a part of the thing return and the remainder has been lost or captured; as, for example, if the ves-

sel has been pillaged by pirates, who take away only a part of the cargo? In such cases the condition applies only to what is saved, and the contract is void as to the remainder." But if the goods of the borrower had been entirely landed before the accident, the contract would not be affected, provided the goods or their proceeds could be laden on board of another vessel. The change of the ship would then be at the risk of the lender. This has been explained in a previous chapter. If the borrower cannot find another vessel in which to ship the goods or their returns, he becomes released from responsibility by rendering an account of the articles saved in the place where the goods are landed. This has also been explained in a previous chapter.

If the effects which were on board at the time of the accident were worth less than the sum borrowed, the contract would still exist as to the surplus. This should be understood, however, subject to the statement that there was originally on board goods to the value of the sum borrowed, and that a portion of them was landed at some time previous to the accident. The authorities will not support the position without this limitation. If the borrower had not shipped to the amount of the loan, the lender could demand only legal interest for that part which was not employed in the voyage and exposed to its perils.

If the effects of the borrower are landed in consequence of the unnavigability of the ship, and he cannot provide another ship for them, they are to be considered as *goods saved*, to the value of which the contract must be reduced. If they are shipped in another vessel, the risk of the lender is transferred with them. But in such a case, if, after the accident, the goods decay or deteriorate in consequence of the delay, either on shore, in the new vessel or otherwise, so as to be less in value than the amount of the loan and interest, it is thought that the lender would be obliged to bear the loss, because the contract is broken by *vis major*.

It follows, from what has been said, that the personal action against the borrower is barred by accidents arising from a *vis major*. Nothing remains for the lender but an action *in rem* against the things saved, and an action *negotiorum gestorum* against him who has managed or taken care of it, and in whose possession it may be. The lender may pay himself from the effects saved, both his principal and interest, if they are sufficient to enable him

to do so. But if they are not, he has no recourse against the person; for all that may be due him, the lender can demand only the value of the effects saved and nothing more. And he can demand this value only from the person in whose hands the goods may be, who has preserved them for account of the parties concerned. From the moment of the accident the lender is seized, of right, of the effects saved; that is to say, he has a special lien upon them for payment of the debt, saving the freight and salvage. If the money was lent upon the hull, the lien of the lender embraces not merely the wreck of the ship, but also the freight on the merchandise saved (*Pothier, n., 52*). But the subject of lien will be discussed briefly hereafter.

In order to relieve himself from his engagement, it is not necessary that the borrower should abandon. The loss by *vis major, ipso jure* releases him from the personal action that flows from the contract (*Valin, art. 13, h. t.*). All that takes place after the accident principally concerns the lender, whose right of action against the borrower ceases, unless he himself has recovered the goods or has been in fault. The borrower can claim nothing from the effects saved until the lender is wholly satisfied. The debtor cannot divide with the creditor to his prejudice; but in some cases the creditor may demand an apportionment with the debtor.

M. Pothier observes that if the loan "be made only on a part of the cargo, as on two-thirds or three-fourths, the lien extends only to that proportion of the effects which are preserved from wreck; the contract is reduced, not to the whole, but to that proportion, and the remaining third or fourth belongs to the borrower, free from any claim; or if the surplus is insured, it should be abandoned to the underwriters" (*Pothier, n. 49, h. t.*). This distinction is also referred to by M. Valin, and flows from true principles (*Valin, art. 11*).

In respect to the effect which the ill success of the voyage, by reason of something beyond the contract of the borrower, may have upon the contract of maritime loan, this does not seem to have been provided for by the French ordinance. But the omission is easily supplied by the application of general principles. The object of the contract is that the vessel shall reach some specified place, where the borrower may sell his merchandise, purchase returns, and make such a voyage as will enable him to comply with his engagements. It is only on his *successful return*

that he has promised to pay the principal and interest. The accident renders this successful return impossible; therefore the *object* has not been accomplished; the condition is not fulfilled; the contract exists in its original state, and ought, necessarily, to be rescinded. If, by accident, the voyage be broken up before it is commenced, the better opinion is that the sum borrowed ought to be returned, without entering into any modifications, which are of no use, but occasion lawsuits. The maritime interest is not due, and common legal interest is due only from the time of demand and refusal (*Vide Pothier, n. 39*).

If money be lent upon the cargo, to go and return, and, in consequence of being rendered unfit to navigate, or other *vis major*, the ship do not return, and no other can be provided for the goods which have been landed, or their returns, the contract is void. The borrower then becomes the mandatory of the lender, and has full power to dispose of the effects saved for the account of the lender, in order that he may be reimbursed. The question has been so decided by the French courts, and the same doctrine has been recognized by the American courts.

An early case, decided in the State of Massachusetts, may be referred to. Money was lent on a bottomry bond, conditioned that if the vessel should perform the voyage the money should be paid in twenty days after her arrival; if she should be lost through the perils of the sea, or by fire, or by the enemies of the United States, the bond to be void. The vessel was captured by a British cruiser, and condemned as lawful prize. Upon appeal, the condemnation was reversed, and full compensation received by the owner for vessel, cargo and freight, by virtue of an award of the commissioners under the treaty of November, 1794. Under these circumstances, the Supreme Judicial Court held that the obligee could not recover in an action of debt brought in the case.

The case was very elaborately argued by the ablest counsel in the State, and an exhaustive opinion given by Parker, J., in the course of which he said: "Whether the terms, *perils of the seas*, comprehend every species of marine accident, where accidents of several sorts are mentioned in addition to perils of the seas, I shall not undertake to decide; but I am satisfied that the taking, as alleged in the plea in bar, is, to all legal intents, a capture by the enemies of the *United States*; and, if it had been so alleged by the defendant, the facts would have supported the plea. It is so

understood in questions of insurance; and the doctrine is fully supported by the English writers on insurance, and by continental jurists of high authority.

"I am, therefore, of opinion that the plea in bar is a sufficient answer to the plaintiff's action, unless it is avoided by the facts set forth in the replication; and whether it is so avoided or not, is the second question which it is necessary to consider.

"By the replication, it appears that the sentence of condemnation was reversed, and that the value of the vessel, cargo and freight, in money, with interest, was awarded to the defendant, and has been received by him before the commencement of this action. It is contended by the plaintiff that, under these circumstances, there was no loss of the vessel; and that, therefore, as the money secured by the bond has not been paid, the bond is forfeited. * * *

"The vessel, in this case, was captured as prize, was condemned, and never returned to the owners, but, probably, was destroyed in consequence of her detention by the captors. Here was a total loss, which discharged the defendant from his bond. But it is said that the defendant has received her value; so that, virtually, there was no loss. In equity, the plaintiff's case is undoubtedly very strong, and I can see no principle of mercantile honor upon which the recovery can be withheld by the defendant; but we must decide upon established legal principles, and are not at liberty to wander into the field of equity to do justice to the parties. The question with us is whether any event, within the condition of the bond, has happened, whereby the obligor is discharged from his contract. The facts relied upon by the plaintiff show that such event did happen, viz., the capture and condemnation of the vessel; and, further, they show that she never did return. And although the defendant has recovered her full value, yet I cannot say that there was a performance of the voyage within the meaning of the condition of the bond" (*Appleton v. Crowninshield*, 3 Mass. R., 443, 461, 462).

Upon examining the treatises of Emerigon, Pothier and Valin, it appears that it is considered in France, as a principle of marine law, that the lender has a claim upon the vessel or effects saved, upon whichever the risk was taken. By these writers it will appear that although a contract of bottomry is extinguished, by any of the marine perils upon which the loan has been placed, yet

that the lender can pursue the effects saved, wherever they may be, and may maintain an action against the borrower, provided they come into his hands. This has been clearly shown in the preceding pages. But no authority can be found to justify the position that a bottomry contract, as such, can be enforced, where the vessel, which was the subject of it, did not reach her destined port of delivery. The lender is not entitled to the benefit of his contract of bottomry unless the voyage be performed as stipulated in the bond. There is no hardship in this rule of the law; or if there is, it is mutual and equal on each side. The debt is to accrue on a contingency, by the express agreement of the parties; if it does not happen, there is an end of the claim, and the contract is extinguished.

It should be stated, however, that under the circumstances of the case of *Appleton v. Crowninshield* (3 *Mass. R.*, 443), while the contract of bottomry will be void, the lender may have his action of *assumpsit* against the borrower for the sum lent and the interest. This was so decided in an action between the parties to the precise transaction, and the decision was put upon the ground that the borrower had received the full amount of the sum borrowed, under the award of the commissioners, by way of compensation for his vessel and freight.

Parker, J., in his opinion, said: "Until I heard the very elaborate and learned argument by the defendant's counsel against the action, I did not entertain a doubt upon this question. It appeared so clear that a part of the money received by the defendant was a compensation for the \$500, for which his vessel was pledged to the plaintiff, that I had no suspicion he would await a suit at law before he paid the money. * * *

"Upon the whole, I cannot see any fair principle upon which a man, who has borrowed money upon the pledge of his vessel, the payment depending upon a contingency, the happening of which is prevented by a third party, who, having destroyed the pledge, afterward makes complete satisfaction for it in money, besides paying him damages for detention, can refuse to repay the money he so borrowed."

Sewell and Sedgwick, JJ., also delivered opinions, arriving at the same conclusion of Parker, J., as above given (*Appleton v. Crowninshield*, 8 *Mass. R.*, 340, 357, 358-369).

And it may be added that the English Court of King's Bench

have decided that nothing short of a total destruction of the ship will constitute such a loss as to discharge the borrower of money upon bottomry (*Thomson v. The Royal Insurance Company*, 1 *Maule & Selwyn's R.*, 30).

A bottomry bond was given on ship, freight and cargo; the money to be paid within twenty-one days of the ship's arrival in the port of London, and not to be demanded or recovered in case the ship and her cargo be lost, miscarry, or be cast away on the voyage. The ship never reached the port of London, but was abandoned, as for a total loss, at Algoa Bay, where part of the cargo was sold, and the proceeds brought to England, and part put into another ship, and also brought to England. The fact that the ship could not be repaired was not proved. The English Admiralty Court held that the bond must be pronounced for, and enforced against the proceeds of the cargo and the cargo shipped (*The Elephanta*, 9 *Eng. Law and Eq. R.*, 553).

CHAPTER LXI.

LIEN OF THE LENDER UPON THE EFFECTS AT RISK — PRIORITY OF LIENS ON THE SHIP — PRIORITY OF LIENS UPON THE CARGO — PRINCIPLES APPLICABLE TO MARITIME LIENS.

IN respect to the lien which the lender has upon the effects subject to risk, there is a difference in the rule, as it has been applied in different countries. Among the Romans, he who lent money to purchase, build, repair or rig a ship, had a lien on the ship, as a security for his debt. But this was exclusively personal. It was only good by way of preference against simple contract creditors, and had no effect against those who were secured by express hypothecations. Kuricke, in his celebrated questions, contends that the Roman laws gave an absolute hypothecation to him who lent money to purchase, build, repair or rig a vessel (*Kuricke, qu. 13, p. 866*). But the design of this author was simply to adapt the texts which he cites to modern customs. According to the Roman law, if one, among those who held hypothecations on the ship, furnished money for her repairs, or to purchase provisions during her voyage, he was preferred to the others, because he preserved the common pledge. The same law prevailed in favor of

one who had a hypothecation on the cargo or furnished money to pay average or freight. He was preferred to the others who had similar liens, because the common pledge would have been lost without his assistance. If the aid was furnished by a third person, who had no previous lien on the ship, he would have only a personal privilege and be excluded by the actual holders of hypothecations (*Vide Donnellus, de pignor, p. 580*).

The *personal privilege*, mentioned in the Roman law, seems to be unknown in the French jurisprudence. Every privilege includes a tacit and exclusive lien, at least against the thing which is the subject of it. In the language of *Livoniere*, "a common hypothecation is governed by the date of the contract, and a privilege is regulated by the degree of favor due to each particular claim, and is preferred to common hypothecation, though prior in time" (*Liv. Regle du Droit, ch. 4, § 1, p. 439*). For example, A. builds a ship and gives an actual mortgage to B. thereon to secure a debt due to him. Afterward the ship sails on a voyage, is damaged by storms, and puts into port to repair. C. furnishes money for the repairs, which gives him a lien, by the French law, on the vessel, even without an express hypothecation. On the vessel arriving home, his lien will be preferred by *privilege* to the prior actual mortgage, by reason of the favor due to his claim. On the same principle, and for the same reason, mariners for their wages will be preferred to the same mortgage, though they have only a tacit and posterior lien.

The ship, her tackle, apparel, furniture, provisions, and even her freight, are liable for the principal and interest of money lent on the body and keel for the necessities of the voyage. In order that the lender may be entitled to this lien, it is sufficient if the money have been furnished *bona fide* on the hull for the necessities of the voyage, although the voyage should be broken up and the vessel seized before she put to sea. In this case there would be no maritime interest, because there was no risk. But the lien would continue on the vessel, within the meaning of the French ordinance, and as the rule is generally understood and enforced.

If money be lent to the captain during the voyage for the necessities of the ship, the lien extends to the whole ship and freight. But if the money be lent to the captain in the place where the owners reside, without their consent, the lien extends no further than to the interest which the captain may have in the ves-

sel and freight. If it be furnished to a captain who was authorized to provide tackle, apparel and furniture, the lender has a lien on the whole vessel. Money furnished to one joint-owner gives a lien only on his own interest in the vessel and freight. The lender on the ship and cargo has a lien *in solidum* upon both. The ship and cargo form but one fund as to him. The borrower, by a conjunction *re et verbis*, has made his interest in the two his capital. This capital is subject, without division, to the lien of the lender, who may pay himself from either or both. The lien of the lender comprehends his principal, interest and other charges. In fact, the obligation to pay the principal and interest arising from the same source, the same lien extends to both. In order to have the advantage of his lien against a third person, it is not necessary that the lender should prove the useful employment of the money; it is sufficient if his title be clear. These are rules laid down by the French writers, and are thought to be of general application (*Vide Pothier, n. 48, 52, 57; Valin, art. 7, h. t., and art. 16, tit. De la Saisie, tom. 1, p. 344*).

In respect to priority of liens on a ship which has not commenced her voyage, the *Consolato del Mare* contained this provision: "If a vessel just built be sold at the instance of creditors before she is launched or before she has made her first voyage, the carpenters, caulkers and other workmen, as well as those who furnished the timber, pitch, nails and other articles which are necessary in the construction of a ship, are preferred to all other creditors, of what sort soever they be, even those who have lent money under a written declaration that it is to be employed in the building of the ship" (*Ch. 32*). And the French *Ordonnance de la Marine* declared: "If the vessel sold have not made a voyage, the vendee, carpenter, ship-builders, caulkers and other workmen employed in her, together with the creditors for the timber, cordage and other articles furnished to her, shall be preferred to other creditors and by a concurrence among themselves" (*Art. 17*).

M. Valin, remarking upon this subject, says: "It is an important observation, on the subject of liens of carpenters and other workmen employed in the building of a ship, that they should *work by the order of the owner*, in order to be entitled to this privilege. If they were employed by an undertaker who has received the stipulated price of the work from the owner, they have no lien

upon the ship, and have no remedy but a personal action against the undertaker, upon whose good faith they acted. This, however, is to be understood in cases where the workmen and material-men knew that it was *a job*, and that they had no business with any one but the undertaker" (*Valin, art. 17, tit. De la Saisie*, 349). The doctrine of this author, therefore, is quite similar to the law of the *Consolato*.

There is nothing which is regarded with so much favor as debts for work and labor furnished to a vessel. Commerce and the country at large are interested in them. It is right that the workmen and material-men should enjoy the lien thus given them. They cannot be deprived of it, unless it is proved that they contracted on the faith of the person and not of the thing.

By the *Consolato del Mare* it appears that "the wages of mariners, employed in the last voyage, shall be paid in preference to all other creditors" (*Art. 16, tit. De la Saisie, Consolato del Mare, ch. 33, 105, 135, 136*). In respect to lenders at bottomry, writers upon maritime law generally agree that the common order of liens is reversed, and the last should be preferred to the first. Kuricke, however, in his celebrated questions, opposes this view. He contends that all the lenders should come in by concurrence, because, by means of their money they enabled the voyage to be performed (*Kuricke, Ques. 25, p. 880*). Emerigon explains the rule in this way: "Before his departure from Marseilles a certain captain borrows money at bottomry. He arrives at Martinique, where he borrows a further sum for the necessities. He reaches Cape Francois, where he again borrows for the same purpose. The third lenders shall be preferred to the second, and those to the first. *Sic erunt novissimi, primi; et primi, novissimi*. But the creditors in each of these classes shall take by concurrence among themselves, without regard to the dates of their respective contracts" (*Emerig. on Marit. Loans, 234*). And it would seem that the same order of liens is recognized by the American courts.

In an early case, decided by the Supreme Court of the United States, Mr. Justice Chase, who delivered the opinion, said: "A bottomry bond, made by the master, vests no absolute indefeasible interest in the ship on which it is founded, but gives a claim upon her which may be refused with all the expedition and efficiency of the admiralty process. This rule is expressly laid down in the books, and will be found consistent

with the principle of the civil law, upon which the contract of bottomry is held to give a claim upon the ship. In the case of a bottomry bond, executed by an owner in his own place of residence, the same reason does not exist for giving an implied admiralty claim upon the bottom; for it is in his power to execute an express transfer or mortgage. There is strong reason to contend that this claim or privilege shall be preferred to every other for the voyage on which the bottomry is founded, except seamen's wages. But it certainly can extend no further." It was held, however, that if the obligee of a bottomry bond suffer the ship to make several voyages without asserting his lien, and executions are levied upon the ship by other creditors, the obligee loses his lien on the ship (*Blaine v. The Ship Charles Carter*, 4 *Cranch's R.*, 328). And to the same effect is an early case, decided by the Circuit Court of the United States for the first circuit, in which it was held that a tradesman has a lien on a foreign ship, lying in a port of the United States, for repairs made by him on board; and such lien will be preferred, in point of right, to a bottomry interest which is prior in point of time, if it appear that the repairs were indispensable.

Story, J., in his opinion, said: "The lien for repairs must take precedence of the bottomry bond. The repairs were necessary to preserve the ship, even if she were to remain in the harbor till she could be sold. It must be presumed that the ship was actually sold, in consequence of the repairs, for as much more as would pay for them. It has been holden that the lender on bottomry is liable to general average, and entitled to salvage (*Mars. on Ins.*, 760, 764).

"This may be considered a continuation of the original voyage" (*The Jerusalem*, 2 *Gallison's C. C. R.*, 345, 346).

But the same court held that where a wharfinger has made an express personal contract with the shipowner, the court will not give his claim a priority over a bottomry interest which had been previously attached to the ship (*Ex parte Lewis*, 2 *Gallison's R.*, 483).

It has been held that if a bottomry creditor satisfies the claims of seamen for their wages, in good faith, for the protection of his demand, the court may recognize in his behalf a novation to those claims, as being equitably compounded with his lien. But he cannot coerce an assignment of their demands to himself (*The*

Cabot, 1 *Abbott's Admiralty R.*, 150). And in a case, decided by the Supreme Court of the United States in 1834, Mr. Justice Story observed: "It has been said that the seamen have a prior lien on the ship for their wages, and that the amount of the wages ought first to be deducted. Undoubtedly the seamen have such prior lien; but the owners are also liable for such wages; and if the bottomry holder is compelled to discharge that lien, he has a resulting right to compensation over against the owners, in the same manner as he would have if they had previously mortgaged the ship" (*The Ship Virgin v. Vyfhius*, 8 *Peters' R.*, 538, 553).

The general rule, in respect to bottomry bonds, is that they supersede all prior liens upon the ship, and are preferred to every other claim for the voyage, except that for seamen's wages. This is a peculiarity relating to those contracts which is always recognized by the courts (*Vide The Madonna*, 1 *Dodson's R.*, 40; *Blaine v. The Ship Charles Carter*, 4 *Cranch's R.*, 328). But, as it has been before shown, this lien upon the vessel, created by the bottomry bond, may be lost by the neglect to enforce it within a reasonable time. Said Lord Stowell, in pronouncing the opinion of the court, in an important case before the English admiralty. "There is a principle of limitation in every system of jurisprudence, to be derived out of the nature of things, which entitles the court to avail itself of the universal maxim, *vigilantibus non dormientibus jura subveniunt*. And in questions of bottomry, more especially, the court is bound to expect particular vigilance, because, although bonds of this kind are to be supported with a high hand, when clear and simple, they are, in many respects, things to be narrowly watched. Bottomry is a transaction which affords great opportunities of collusion; and, therefore, on the very account of the importance given to these bonds, they are to be pursued with very active diligence, in order that the court may have the opportunity of considering them in their recent origin, with a view to all the circumstances on which their honest validity depends" (*The Rebecca*, 5 *Rob. Adm. R.*, 94; and *vide The Ship Madora*, 2 *Woodb. and Minot's R.*, 92).

Le Guidon de la Mer speaks of renewal; that is, the renewing, from one voyage to another, of securities for money lent by maritime. The language is: "These renewals have no special-lien on the profits of the voyage, but are to be considered as among the youngest privileged creditors. If the merchant reserve the profits

of each voyage, and leave the principal in the hands of the master to be again employed, his right shall not be good against the tradesmen and victualers, nor those who have lent their money by bottomry for the particular voyage" (*Guid. de la Mer, ch. 19, art. 2*). And in the 10th article (*h. t.*) of the French ordinance, it is also said that "money left by renewal or continuation of the contract shall not come into concurrence with that which is actually furnished for the same voyage." The creditor in this case, doubtless, would have a lien; but it should be declared to be posterior to all others, and not prejudicial to the owners of the ship, unless they had authorized the renewal contracted by the captain.

By the French law the seller of merchandise, and indeed of anything else may pursue the property in the hands of the purchaser for the payment of the consideration money, as long as it can be identified. As to houses, lands and ships, he may pursue the objects sold, even in the hands of a third person. This is carrying the doctrine further than it is carried in this country or in England. Here the vendor of real estate has an equitable lien upon the property sold for the unpaid purchase-money, as against the vendee himself, but not as against a *bona fide* purchaser from the vendee. And the French doctrine appears rigorous to an American lawyer, who will immediately suppose the case of a *bona fide* purchaser without notice. But the hardship will disappear when it is considered that, in France, a deed or bill of sale is not accompanied, as it is here, with a receipt in full of the consideration money, but the credit given, and the terms of payment are always expressed on the face of the instrument of sale. Therefore the case of a *bona fide* purchaser without notice can never occur. If the vendor should indorse a receipt in full on his bill of sale, he would undoubtedly lose his lien, and be driven to the new security which he had thought proper to take from the purchaser.

The vendee of a ship which is not yet paid for may, then, under the French law, reclaim it by action, to pay himself, provided he yields the preference to those creditors who are privileged as before stated; and the same rule would apply here, at least, as against the vendee himself, and purchasers from him, with notice that the purchase-money remains unpaid. It is considered to be repugnant to the most common rules, if the vendor of a ship on credit should be obliged to yield to simple creditors of the vendee,

or if he were compelled to come into concurrence with simple contract creditors, whose claims have no connection with commerce. The privilege of the vendor is usually recognized by other creditors, whose debts have no direct relation to the ship. But, however, those who have lent money for the necessities of the ship during the voyage, those who have made advances for the repairs, victuals and equipment before the departure, and shippers, are preferred to the vendor. The ship, by putting to sea under the name and at the risk of the new owner, ceases to be liable to the creditors of the vendor; and, with more reason, the vendor ceases to have any lien, excepting that which results from general rules of law.

In respect to priority of liens on the cargo, it may be remarked that the charges for unloading, portorage and storage, are usually placed in the first rank, and the captain's lien on the produce of the cargo for the freight and general average is placed in the second rank (*Kuricke Quest.*, 11). If in the course of the voyage the shipper require money to save his goods or repair injuries which may have happened to them, the lender will acquire a lien subsequent to the freight and general average. All those who lend money on the cargo or on small adventures, before the departure, come into concurrence. If the merchant borrowed by way of maritime loan in an intermediate port, in order to increase his adventure, the second lenders are not preferred to the first. They come into concurrence, because money borrowed in the course of the voyage has not had for its object the preservation of the common stock (*Kuricke Quest.*, 25, p. 880; *Loccennius, lib. 2, ch. 6, n. 8, p. 993*). The privilege of the lender by maritime loan is of public importance, and is, therefore, preferred to that of the vendee, who has not been paid for his merchandise. Where a person purchases merchandise on credit, and also borrows money by maritime loan on the same effects, from the moment of the loan the effects become pledged to the vendee, who furnished money only on the faith of the goods. The French ordinance, in speaking of a vessel which has not yet put to sea, places the vendor among the privileged creditors, and gives him a preference to the lenders on the hull, because the risk does not commence until the ship has weighed anchor. But the risk on the lading commences the moment it is put on board. The right of the shippers to a lien is consummated by landing the goods, and that

of the lenders by the departure of the ship ; and since the vendor of a ship which has put to sea is excluded by the lenders on the hull, the vendor of merchandise on board should be excluded by the lenders on the cargo. He who buys merchandise on credit may dispose of it according to his own pleasure. If he ship it, it is because he supposes he will find a better market. If he borrow money by maritime loan *on the goods*, the lenders have a lien and special privilege on the effects embarked and their returns in preference to a vendor, who cannot reclaim the thing sold, much less its returns, to the prejudice of the lender. Such has always been the understanding of the law on the continent of Europe, and the same is doubtless the rule here.

A charterer who has hired the whole capacity of a vessel, and loaded her with goods of other parties, the freight of which exceeds the amount of the charter money, is entitled to be paid such excess out of the freight money in preference to the holder of a bottomry bond upon ship, freight and cargo, executed after the charter party ; so held by the United States District Court for the eastern district of New York (*Freight Money of the Anastasia*, 1 *Benedict's D. C. R.*, 188). And it has been held by the English Admiralty Courts that a bottomry bond cannot affect a previous contract in a charter-party, so as to take precedence of money advances made subsequently to the bond, under the authority of the charter-party (*The Salacia*, 32 *L. J. Adm.*, 43). But the same court has recently held, in conformity to the doctrine understood to prevail in the United States, that a bottomry bond is entitled to priority over a mortgage during the voyage for which the bond was executed. The court declared, however, that when the bond becomes due it should be enforced within a reasonable time, and that a voluntary agreement on the part of the holder to postpone payment under it alters its character totally, and substitutes a contract over which the Admiralty Court, at least, has no jurisdiction (*The Royal Arch*, 1 *Swabey's Adm. R.*, 269).

A loan "upon the goods to the amount of the loan, laden or to be laden on board, or which may be laden on board at any time during the voyage," gives the lender only a lien on the homeward cargo, which will be postponed to a claim of the United States on the obligor. But delivery to the obligor of the homeward bill of lading, after the ship's arrival, converts his equitable into a legal

interest (*Atlantic Insurance Company v. Conrad*, 4 Wash. C. C. R., 662).

Where bottomry bonds are given as collateral security for debts due, that fact may be shown if the interests of third persons are thereby to be affected, notwithstanding the recital in the bond that they are given for money lent and advanced (*Greeley v. Waterhouse*, 1 App. R., 9).

Reference has been heretofore made with respect to the time within which a party should prosecute his lien upon a vessel in order to enjoy the benefit of the same, and it was stated that the matter must be attended to within a reasonable time. So the courts hold (*Vide The John Lowe*, 2 Ben. C. C. R., 394). But it has been decided that there is no fixed time for liens to expire which exist at common law, except the time of parting with the possession, and none in maritime liens where possession does not exist with them exclusively, except the end of the next voyage, or the intervention, after it, of rights of third persons without notice (*Packard v. The Louisa*, 2 Woodb. & Minot's C. C. R., 48; and *vide Burke v. The M. P. Rich*, 1 Cliff. C. C. R., 308).

It should be added here that it is a maxim of the common law "that a lien never takes place without an express law to authorize it." And another rule, not less general, is, "that liens of every sort are regarded with a jealous eye, because they are prejudicial to third persons." It is for this reason that they are never implied. It is always necessary that there should be a formal obligation executed which produces a conventional lien, or an express law which creates a legal lien; otherwise there is no lien, nor can there be by any construction or implication.

Liens are *stricti juris*. They cannot be extended from one case to another. Respecting them there is no arguing by deduction or analogy. The lien must be created by the law itself. If the thing which is the subject of the lien be extinct, the lien is lost. These are general principles, which apply as well to maritime liens as to others. The maritime law gives no lien by implication (*Vandewater v. Yankee Blade*, 1 McAll. C. C. R., 9).

Bottomry is a peculiar contract, differing essentially from a loan with security, and is inconsistent with the existence of the lien implied by the marine law to secure advances to a master in a foreign port to make necessary repairs. Where the express contract of bottomry is void for fraud, no recovery can be had upon

the footing by an implied contract and lien (*The Brig Ann C Pratt*, 1 *Curtis, C. C. R.*, 340). And it has been decided by the Supreme Court of the United States that the fraudulent taking of a bottomry bond for a larger amount than the actual advance vitiates the bond and avoids the bottomry lien; and that the party taking it, under such circumstances, has no lien upon the vessel for his actual advances under the general maritime law (*Carrington v. Pratt*, 18 *How. U. S. C. R.*, 63).

CHAPTER LXII.

THE BOTTOMRY BOND — FORM, INTERPRETATION AND EFFECT OF IT —
REQUISITES OF THE CONTRACT OF BOTTOMRY — OTHER SECURITY
MAY BE TAKEN WITH THE BOTTOMRY CONTRACT — THE LENDER'S
REMEDY IN CASE OF MARITIME LOANS — THE FORM OF THE
DECREE IN ADMIRALTY.

It has been stated in a previous chapter that bottomry and *respondentia* are, in their nature and effects, quite similar. The first gives a lien on the ship; the latter gives a lien on the cargo of a ship. In all other respects, bottomry and *respondentia* are declared to be identical; so that in giving the form, interpretation and effect of the one, the same is substantially given of the other.

The elements of the contracts of bottomry and *respondentia* are all sanctioned by well-settled principles; and in respect to their form, it is only necessary that they embrace, substantially, the terms upon which they are upheld. The contract involves an advance of money at a premium beyond the statutory rate of interest for the purposes and objects recognized by law, dependent for its return on the result of a real risk—a risk in which the lender, in good faith, hazards his money. Where these features of the transaction all appear in the contract, its form will be sustained.

It is absolutely necessary that the liability of the lender to the sea risks should appear or be fairly collected from the instrument, otherwise the reservation of maritime interest will render the security void on the ground of usury, not only as a charge upon the ship, but also against the person of the borrower (*Maitland v. The Atlantic*, 1 *Newbury's Adm. R.*, 514). And it is essential to a valid bottomry bond, such as gives an Admiralty Court jurisdiction,

that the debt be risked on the bottom and loss of the vessel; and that the loan be at maritime interest. If these elements are wanting, the contract will be deemed a mere mortgage, notwithstanding the instrument may be called a bottomry bond. To this effect are the authorities (*Vide Leland v. The Medora*, 2 Woodb. & Minot's R., 92; *Greeley v. Smith*, 3 ib., 236, 248). If the lender of money on a bottomry or *respondentia* bond be willing to stake the money upon the safe arrival of the ship or cargo, and to take upon himself, like an insurer, the risk of sea perils, it is lawful and reasonable that he should be authorized to demand an extraordinary interest to be agreed on, and commensurate to the hazard. But all these elements are essential to appear in the bond, or its effects may be changed and the objects of the parties defeated (*Maitland v. The Atlantic*, 1 Newbury's Adm., R., 514).

An instrument which was executed collateral to a bill of exchange drawn by the master of the vessel upon her owner, provided as follows: "For the better securing of payment of the said bill of exchange, etc., in any port where the said brig may be, I do hereby bind myself, the owner of the said brig, and particularly the said brig, her tackle, etc." The United States Circuit Court for the southern district of New York held that the instrument was not a bottomry bond, within the sense of the maritime law. Neither marine risk nor marine interest was provided for, and the personal liability of the master and owner was secured. And it was declared that all that was stipulated by way of hypothecation was a lien on the vessel until payment of the debt (*The William & Emeline*, 1 Blatch. & How. Adm. R., 66). It may be affirmed, however, that a personal liability, in case the vessel is not lost, is harmless in the contract of bottomry. It is only a personal liability which continues, notwithstanding the loss of the vessel, which is regarded as inconsistent with the contract of bottomry (*Greeley v. Smith*, 3 Woodb. & Minot's R., 236).

Judge Bouvier observes: "The form of the contract is either by bond, or bill of bottomry. The contract should state: 1st. The sum loaned, and at what interest or maritime profit. 2d. The subject upon which the loan is made. 3d. The name of the vessel and of the captain. 4th. Those of the lender and borrower. 5th. The description of the voyage, its commencement and termination" (1 Bowv. Inst., 507).

Parties preparing the contract in cases of bottomry and respon-

dentia, by carefully observing these rules, may avoid uncertainty and mistake, and thereby save litigation, damage, cost and expense. The sum loaned and at what interest; the thing pledged; the names of the ship and the captain; the names of the lender and borrower, and the description of the voyage, or the term for which the loan is made, are all indispensably necessary to be expressed in the contract, and the form should be cautiously observed.

According to the form of respondentia bond used in Philadelphia, it seems that payment of the debt and marine interest depends on the safe return of the goods, and not on that of the ship. The borrower, therefore, is obliged to pay if he receives his goods safely, though by another ship. The words "an utter loss of the ship," in such bond, means an actual, total loss, and not a constructive one (*Pennsylvania Insurance Company v. Duval*, 8 Serg. & Rawle's R., 138). And where the parties to such bond agree that the lender "shall be liable to average and entitled to the benefit of salvage, in the same manner as underwriters on a policy of insurance, according to the usages and practices of the city of Philadelphia," the court holds that the borrower is not entitled to calculate an average loss on the whole amount of the money loaned on marine interest, but only on the cost and charges on board and the premium of insurance (*Gibson v. Philadelphia Insurance Company*, 1 Binney's R., 405).

Another Philadelphia case was this: Money was loaned at Philadelphia on respondentia by the ship J., at and from Liverpool to Canton, and thence to Philadelphia. No bond was executed at the time, as it was not then known whether the shipment at Liverpool would be in specie or goods, but the bond was to be given subsequently; and in the meantime the parties agreed that bills of lading outward at Liverpool for \$17,000 if specie should be shipped, or for \$20,000 value of goods at par if specie should not be shipped, "in which case the lenders should only be liable for average and entitled to salvage, as if it had been a specie shipment." And also bills of lading of the returns at Canton should be assigned to the lenders as collateral security for the bond to be given. The vessel sailed from Liverpool with 700 pieces of goods, of the value of \$20,000, but without specie, and was stranded and lost and forty-five pieces of goods were lost, and the remainder saved, but damaged. The court held that the lenders were not liable for the damage of the goods saved, but only for those which

were lost, the true construction of the contract being that they should be exempt from damage as they would have been if specie had been shipped (*Delaware Insurance Co. v. Archer*, 2 *Rawle's R.*, 216).

• Abbott, in his work on Shipping, says: "There is no settled form of contract in use on these occasions. Sometimes an instrument in the form of a bond, at others in the form of a bill of sale, at others of a different shape, is made use of. But, whatever the form, the occasion of borrowing, the sum, the premium, the ship, the voyage, the risks to be borne by the lender, and the subjection of the ship itself as security for the payment, all usually are, and properly ought to be, expressed. It is absolutely necessary that the liability of the lender to the sea risks should appear to be fairly collected from the instrument, otherwise the reservation of maritime interest will render the security void on the ground of usury, not only as a charge upon the ship, but also against the person of the borrower. And, where an instrument called a bottomry bond contained an express clause that the sum secured be paid within thirty days after intelligence of the loss, Lord Stowell doubted his jurisdiction to entertain the suit at all, and dismissed it on the ground that the very essence of bottomry, which alone could give jurisdiction to the admiralty, was wanting (*The Atlas*, 2 *Hagg. Adm. R.*, 57). From this sentence an appeal was presented to the delegates; and that court, after directing a search for precedents, decided that, as maritime interest was reserved and maritime risk excluded from the bond, it was void" (*Abbott on Shipping*, 158).

• An important case came before the English Court of King's Bench many years ago, wherein it appeared that, in a respondentia bond, the condition, after reciting that the money was lent *upon the goods laden and to be laden* on board, a certain ship should proceed on her voyage and return within thirty-six months (the dangers of the sea excepted); and if the borrower, within thirty days after her arrival, should pay to the lender the sum agreed on, or if, in the voyage and within thirty-six months, the ship should be lost by fire, enemies or other casualties, the borrower should, within six months after such loss, pay to the lender a proportionable average on all the goods carried out and acquired during the voyage which should be saved, then the obligation to be void. The court held that this was no more than a personal

obligation from the borrower to the lender, and did not give the latter any specific *pledge or lien* on the home cargo or the proceeds thereof.

Lord Ellenborough, C. J., in his opinion, said: "This appears to be a contract not of universal nature, but depending upon the particular form of the instrument, varying in different countries. In Spain it seems more like a direct hypothecation of the goods; which would make all the difference in the construction. But nothing of that sort is to be found in this instrument. In the introductory part, instead of the condition, the money is stated to be lent *on the goods*; but that is explained in the subsequent part, and shown to be only a pledge for the purpose of salvage. And no action could be maintained by the obligor to recover possession of those goods from the borrower, or any other having, also, a claim upon them; for, admitting that the borrower and lender were even partners in them, the latter could not maintain trover against the other. We must construe the contract upon the words of this bond, such as these parties have made use of; for it is this contract, and not one of a general nature, to be governed by general usage, that they have entered into. If, indeed, there were any word used of doubtful signification, it might be construed by general usage. But here the terms of the bond are very plain and intelligible, and amount only to a personal obligation on the borrower" (*Bush v. Fearon*, 4 *East's R.*, 319).

Where a bottomry bond is given upon vessel and freight it binds them only, and not the cargo, although in a recital in the bond it is stated that the master was necessitated to take the sum loaned on the vessel, her cargo and freight. If the omission was by mistake, and is so stated in the libel, it is held that it might be reformed. Where the freight is pledged generally, it includes the whole freight for the voyage which the ship is in the course of earning; and not merely freight to be subsequently earned, as upon a new contract. Upon any other construction, where the vessel is repaired at an intermediate port, without any change of her cargo, no freight at all would be hypothecated, for no distinct freight would grow due for the voyage from the port of repairs. The freight ultimately paid need not be divisible. Where the parties pledge freight, it must, in the absence of all other counter proofs, be presumed that they mean the freight to be earned by the ship in the course of the voyage, which has been interrupted

by the disaster. Such was the construction put upon a bottomry bond which came before the Circuit Court of the United States for the first circuit in 1824, and it seems reasonable and proper (*The Zephyr*, 3 *Marine C. C. R.*, 341).

A construction has lately been put upon a bottomry bond, in the English Court of Chancery, which is quite important as a reference. The master of a ship executed a bottomry bond upon the ship, the condition of which was, that if the ship should arrive at the end of her voyage, and, on such arrival, the amount of the bond should be paid to the lenders, or, in case of the loss of the said ship, such an average as by custom should have become due on the salvage, or if, on the voyage, the ship should be utterly lost, cast away, or destroyed in consequence of the perils of the sea, then the bond should be void. The bottomry bondholder effected an insurance on the bottomry bond against the perils of the sea, etc. The ship was, by the perils of the sea, so much damaged as to be not worth repairing, and was sold by the master for a sum much less than the amount of the bond. The court held that the condition of the bond only referred to an actual, total loss of the ship, and not to a constructive total loss; and that there had, therefore, been no loss of the bond within the policy of insurance, and the bondholder was not entitled to maintain an action upon it against the insurers (*Bloomfield v. The Southern Insurance Company*, 22 *L. T. R. Ex.*, 371; and vide 2 *Albany Law Journal*, 92).

It has been held that a loan "upon the goods, to the amount of the loan, laden or to be laden on board, or which may be laden on board at any time during the voyage," gives the lender only a lien on the homeward cargo, which will be postponed to a claim of the United States on the obligor. But delivery to the obligee of the homeward bill of lading, after the ship's arrival, converts his equitable into a legal interest. And it was declared that no fraud, practiced by the borrower or his agents, can affect the validity of the bond, if the lender do not participate therein (*Atlantic Insurance Company v. Conrad*, 4 *Wash. C. C. R.*, 662).

Bottomry bonds are not to be construed literally, but liberally, so as to carry into effect the intention of the parties. Accordingly, it has been held that the holder of a bottomry bond will not lose his money where the non-performance of the voyage has not been occasioned by the enumerated perils, but has arisen from the fault

or misconduct of the master or owner. And it was held in the same case that, in cases of bottomry, a loss, not strictly total, cannot be turned into a technical total loss, by abandonment, so as to excuse the borrower from payment, even though the expenses of repairing the ship exceeds her value (*Pope v. Nickerson*, 3 *Story's R.*, 465).

In respect to the remedy which the lender has upon a bottomry or *respondentia* bond, the question is ordinarily a very simple one. As a general rule, he has his remedy by action of covenant or debt at common law for a breach of the stipulations, or forfeiture of a condition of the bond. But when the lender desires a specific performance of his bond, his remedy is in a court of equity or of admiralty. The contract of bottomry is one over which the admiralty especially exercises an undisputed jurisdiction. Indeed, it has been held to be the only tribunal capable of enforcing a specific performance *in rem* by seizing into its custody the very subject of hypothecation (*The Jerusalem*, 2 *Gill. R.*, 191, 196). And it seems that a proceeding *in rem* may be maintained in our courts against property within our jurisdiction, although the parties may be foreigners. It has been so held in our own admiralty courts (*Davis v. Leslie*, *Abb. Adm. R.*, 123); and the same doctrine has been recognized and expressly approved by the Courts of Admiralty in England (*The Gobebechick*, 1 *Wm. Rob. R.*, 143).

It has been held by the United States Circuit Court for the first circuit that the admiralty has jurisdiction over maritime contracts *in personam* and also *in rem*, where there is a maritime lien or express pledge as security; and this embraces a bottomry bond given by the owner in the home port, where there is an express pledge as security (*The Draco*, 2 *Sumner's R.*, 157; and *vide Wilmer v. The Smilax*, 2 *Pet. Adm. R.*, 295, *note*). This case of *The Draco* was disapproved as unsound in a much later case, but followed nevertheless as an authority (*Greeley v. Smith*, 3 *Woodb. & Minot's R.*, 236). A bottomry bond given in a foreign port by the owner himself, and without necessity for the ship, is held to be a maritime contract, cognizable in the admiralty, as well as a bond made by a master. It is held that there is no reason for any distinction (*The Mary*, 1 *Paine's C. C. R.*, 671). And the general doctrine was declared at an early day by the Circuit Court of the United States.

Story, J., said: "In my judgment, and I speak after having

given the subject a very grave consideration, the admiralty has always *rightfully* possessed jurisdiction over all maritime contracts, and the decisions of the courts of common law prohibiting its exercise are neither consistent in themselves nor reconcilable with principle. In the struggle between the courts of common law and the admiralty, which originated in the same spirit that attempted to break down the whole system of equity, it cannot be denied that the former have manifested a great degree of jealousy and hostility, fostered by strong prejudice and a very imperfect knowledge of the subject. It is not, therefore, to be wondered at that in such an unequal contest, where the power was all on one side, the admiralty should have lost many of its inherent rights. In more modern times, when the jurisdiction of the admiralty has been better understood, a more liberal policy has been prescribed, and, where they have not been fettered by authority, judges have been more indulgent in allowing its exercise. The true doctrine was always asserted by the learned judges of the admiralty, and has been recently recognized by Mr. Justice Buller, that the jurisdiction as to contracts depends not upon the locality, but upon the subject-matter of the contract (*Menetone v. Gibbons*, 3 T. R., 267). And I have not the slightest hesitation in holding that the admiralty has perfect jurisdiction over all maritime contracts. The decisions at common law on the subject of its jurisdiction have nothing to recommend them, and certainly are not binding on us" (*The Jerusalem*, 2 Gallison's C. C. R., 345, 348).

It has been stated in another place that in respect to contracts of bottomry and the application of rules of admiralty to them, depending upon the question of their being executed in foreign ports, the various States of the American union are to be regarded as foreign to each other. It seems pertinent to repeat the doctrine under the present head (*Vide The William and Emmeline*, 1 Blatch. & How. Adm. R., 66; *The Hilarity*, *Ib.*, 90).

It has been held by the Court of Errors and Appeals of Mississippi that the legislature has no authority to create maritime liens, or confer jurisdiction on State courts to enforce such liens by proceedings *in rem*; and that such jurisdiction is exclusively in the Courts of Admiralty of the United States. A suit was brought against a vessel by name, and the vessel attached under the watercraft laws of Mississippi, for a debt due the plaintiff. The plaintiff made an affidavit that the defendant was a steamer in the navi-

gable waters of the State, and in his declaration set forth that he was a citizen of Mississippi, and that the "home port" of the vessel was in that State. But it was held that the court had no jurisdiction, the case being one of admiralty.

Shackelford, J., who delivered the opinion of the court, admitted that the statute gives the remedy, in the State courts, to the creditor, whether the vessel is engaged in trade exclusively between ports in the same State or ports in different States. But he held, upon authority, that the jurisdiction conferred by the act of congress of 1789, on the District Courts of the United States in civil cases of admiralty and maritime jurisdiction, is exclusive by express terms, and that this exclusion extends to State courts (*Deever v. The Steamer Hope*, 9 *Am. Law Reg., N. S.*, 683).

This doctrine seems to be in accordance with the decisions of the Supreme Court of the United States. In a late case, the owner of the vessel excepted to the jurisdiction of the Circuit Court of the State of Alabama, and alleged that the vessel, at the time the cargo was shipped, was duly enrolled and licensed under the laws of the United States; that she was then and there engaged in commerce and navigation between the city of Columbus, in the State of Mississippi, and the city of Mobile, in the State of Alabama, and that the cargo described in the libel was lost on her trip from the former city to the port of destination.

In one of the shipments mentioned in the libel, the cargo was shipped from a port in the State of Alabama to the city of Mobile, but the cases were decided together. The counsel for the libelants contended that inasmuch as the cargo was shipped in one of the cases from ports in the same State, the State court had jurisdiction of that case, impliedly admitting the jurisdiction of the court would not attach, if the cargo had been shipped from a port in a different State to the city of Mobile.

The court, after an elaborate review of most of the decisions of the Supreme Court of the United States, involving questions of jurisdiction in cases of admiralty, held that the State court in Alabama had no jurisdiction of those cases, including the one where the cargo was shipped in Alabama, and declared that the exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction is, by the terms of the ninth section of the judiciary act of 1789, conferred upon the District Courts of the United States, saving to the suitors, in all cases, the right of a

common-law remedy, where the common law is competent to give it. Mr. Justice Clifford, in his opinion, reviewed the case of *Allen v. Newbury*, previously decided by the court, and reported in 21 Howard's Reports, 244, and which was supposed to hold a contrary doctrine, and observes: "Remarks, it is conceded, are found in the opinion of the court in the case of *Allen v. Newbury*, inconsistent with these views, but they were not necessary to that decision, as the contract in that case was for the transportation of goods on one of the western lakes, where the jurisdiction in admiralty is restricted, by an act of congress, to steamboats and other vessels employed in the business of commerce and navigation between ports and places in different States and territories" (*The Belfast*, 7 Wallace's R., 624).

In England, it seems that the admiralty jurisdiction extends to bottomry bonds when made abroad for the necessities of the voyage, whether made by the master or the owner (*Duke of Bedford*, 2 Hagg. Adm. R., 294). But this rule does not extend to bottomry loans made by the owner in the home port (*The Barbara*, 4 Rob. R., 1; *Johnson v. Shippen*, 2 Lord Raym. R., 983). In this latter respect, the rule is different in the United States, as has been before shown.

It may be added that, in making a decree upon a bottomry bond, the principle is to consider the sum lent and the premium as a principal, and to allow common interest on that sum for the delay of payment after it is due. This has been stated in another place, but should be repeated here (*Vide The Packet*, 3 Mason's C. C. R., 255).

CHAPTER LXIII.

SOME POINTS RESPECTING MARITIME LOANS SETTLED BY AUTHORITY, PROMISCUOUSLY STATED.

THOUGH the form of bottomry bonds differs in different countries in respect to the obligation of the owners, the established doctrine in England and America is, that the owners are not personally bound, except to the extent of the fund pledged, which comes into their hands. The Supreme Court of the United States have held, that to this extent they may be said to be personally

bound, as they cannot subtract the fund and refuse to apply it to discharge the debt. The court further declared that, where the value of the ship, being the only fund out of which payment can be made, falls short of the full amount due upon the bond, this is the misfortune of the lender and not the fault of the owners. The latter are not to be personally responsible because the fund turns out to be inadequate (*The Virgin v. Vyfhius*, 8 *Peters' R.*, 538; and *vide The Nelson*, 1 *Hag. Adm. R.*, 176; *The Tartar*, *Ib.*, 1, 13). In some countries bottomry bonds bind the owners; in others, not. And where they do not, even though the terms of the bond should affect to bind the owner, that part would be insignificant, but it would not at all touch upon the efficiency of those parts which have an acknowledged operation.

A bottomry bond may be held good in part and bad in part. The rule of the common law, that the bond must be good in all or not at all, does not prevail in admiralty, which act as courts of equity. So far as the money was properly advanced, the bond may be held to give a valid lien, and be dismissed as to the rest (*The Packet*, 3 *Mason's C. C. R.*, 255; *The Hunter*, *Ware's D. C. R.*, 249; *Furniss v. The Magoun*, *Olcott's D. C. R.*, 55). But the cases in which a bottomry bond has been held good in part and bad in part have been cases in which the items rejected were not properly chargeable on the ship, or were embraced within the bond from inadvertence or mistake, but not fraudulently. Where the objectionable items are fictitious, and inserted in the bond with an intent to defraud third persons, the entire security becomes tainted, and a party to the fraud is not allowed to enforce it, even for the sum actually advanced. If, in such cases, the security were held valid to the extent of the loss, rejecting the excess, the guilty party would risk nothing, for, when detected in the fraud, he would still be able to maintain himself for the amount due. The rule of a court of equity or of admiralty is, therefore, in such cases, to leave the parties where it finds them. For this reason, where a bottomry bond was taken for a larger amount than was actually advanced, with a fraudulent purpose to enable the owner of the vessel to recover the amount of the bond from the underwriters, the Supreme Court of the United States held that the bond was void (*Carrington v. Pratt*, 18 *How. R.*, 63; *vide The Ann C. Pratt*, 1 *Curt. C. C. R.*, 340).

If, after the risk on a bottomry bond has commenced, a sale or

transfer of the vessel takes place, or the voyage is in any manner broken up by the borrower, the maritime risk terminates as in the case of a policy of insurance, and the bond becomes presently payable. The vendee, in case of a sale, is not liable to the bottomry lender for either principal or interest. Nor can he, on the other hand, entitle himself, as vendee, to any benefit of the bottomry bond. The sale of the vessel terminates all interest in the borrower; not only his interest in the voyage, but his power over the voyage. The bottomry bond is a contract for any voyage during the limited period carried on by the borrower, as owner, and not *ultra*. This was so held by the United States Circuit Court in a case where the bond contained a special clause restricting any sale of the vessel during the risk (*The Draco*, 2 Sumn. C. C. R., 157).

It was held by the late Chief Justice Taney, sitting in the United States Circuit Court of the fourth circuit, that if the owner of the cargo stands by and suffers the cargo to be sold under a bottomry bond, without requiring evidence of the necessity for the repairs, it will not avail him, in an action against the shipowners, to show that the necessity did not exist (*Naylor v. Baltzell*, Taney's C. C. R., 55). And the same distinguished court decided some other quite interesting points in another bottomry case. O. having made advances for repairs of a schooner, the title to which, according to her papers, was in D. (a relation of one of the firm of W. & Co.), sent the bottomry bond to W. & Co. for collection, supposing them to be her charterers, whereon they indorsed an acquittance acknowledging themselves to be the sole debtors to O. W. & Co. had previously written to O. that they were her owners. After maturity of the bottomry debt, O., not knowing of the acquittance, sued W. & Co., and obtained judgment on an account in which the amount of the bottomry bond was included. Afterward one H. purchased the schooner, knowing all these facts.

On a libel filed by O. to enforce his bottomry lien, the court held, 1. That the acquittance was a fraud upon the libelant and a mere nullity, and did not in any degree impair the security of the bottomry bond. 2. That O.'s suit against W. & Co. did not amount to a waiver of the bond, but would have been a waiver if brought by O. with a knowledge of all the facts. 3. That H. could not hold the vessel discharged from the lien of the bond, inasmuch as he purchased her with notice of O.'s claim (*Herwig v. Oakley*, Taney's C. C. R., 389).

The United States District Court of Rhode Island has recently held that where a vessel is libeled and sold on a bottomry bond, the bond in court is not subject, as against the bondholder, to any claim for a general average loss subsequent to the date of the bond (*Oologardt v. The Anna*, 9 *Am. Law Reg., N. S.*, 475).

It has been held by the courts both of England and this country that, where bills of exchange are given as collateral security for a bond of bottomry, the bills do not destroy the validity of the bond (*The Augusta*, 1 *Dod. R.*, 283; *The Jane*, *Ib.*, 461). A bill of exchange, in such a case, is not an independent security payable at all events. It is collateral to the bond, and is subject to the same contingencies; and a discharge of one security is a discharge of both (*The Hunter*, *Ware's D. C. R.*, 249). Even if the bottomry bond is indorsed as collateral security for the bill of exchange, the bond will not be vitiated by the bill, provided the security by the bottomry was contemplated on the advance (*The Tartar*, 1 *Hagg. Adm. R.*, 1; *The Nelson*, *Ib.*, 169, 179; *The Emancipation*, 1 *Rob. R.*, 124; *The Madora*, 2 *Woodb. & Minot's C. C. R.*, 92). But it is requisite in all cases, however, that the bottomry should be the original security, although there is no objection to the lender taking security additional to the bottomry bond (*The Ariadne*, 2 *Wm. Rob. R.*, 421).

Some very important principles were enunciated, in a comparatively recent case, before the English Court of Common Bench, involving questions of bottomry. The court held that the master of a vessel has no authority to hypothecate the ship for money borrowed at a foreign port for necessary repairs and disbursements, and *by the same instrument* pledge the personal credit of his owner for such advances, whether maritime interest be stipulated or not. But it was declared that a bottomry bond may be given at the same time with, and as collateral security for, bills drawn on the owners for moneys so borrowed.

The master of the vessel finding it necessary to borrow money in a foreign port, under circumstances which would justify him in borrowing the same in the usual way upon bottomry, borrowed a certain sum of money and executed an instrument to the lenders, by which there was a distinct hypothecation of the ship, her cargo and freight, and then contained a separate and distinct reservation of a right to the lenders to resort to all legal means to enforce repayment of the money, either against the ship or her owners.

Parke, Baron, delivered the judgment of the court, and said: "As to the principal question: The master of a vessel on a foreign voyage has no authority to bind his employer to everything which he may deem to be, or which really may be, for the interest of his employer; but the law, looking to the ordinary perils inseparable from navigation, gives him certain powers, in order to provide for the completion of the voyage, and, amongst others, the power to pledge in a foreign country the personal credit of the owners for necessary repairs; and, if that should be ineffectual, a power to pledge the ship itself by an instrument of hypothecation. But this power does not extend to more than *hypothecation*, well known in the civil law, and distinguished from a mortgage, as well as a pledge or pawn at common law—the former of which transfers the property, the latter a lien on the chattel—and is void without actual possession; but hypothecation gives only a right, to be enforced against the subject of it through the medium of process.

No authority has been cited, nor are we aware of any, authorizing the actual transfer of the property by the master by way of mortgage in any case. The instrument, therefore, in this case, could not be effectual to transfer any property to the assured.

The master having the power of hypothecation, only to be enforced against the ship by admiralty process, the first question is, whether the hypothecation in this form is valid. We agree with the Court of Common Pleas in their opinion that it is not; and therefore my brother Alderson was right in directing the issue on the interest to be found for the defendant" (*Stainbank v. Shepard*, 4 *J. Scott's R.*, 418, 442; *S. C.*, 76 *Eng. C. C. R.*, 417, 441, 442).

In an important case before the English admiralty, Lord Stowell says: "One objection is, that it (the instrument under consideration) binds the owners *personally* as well as the *ship and freight, which it cannot do*. Here we don't take this bond *in toto*, as is done in other systems of law, and reject it as unsound in the whole if vicious in any part. But we separate the parts, reject the vicious, and respect the efficiency of those which are entitled to operate. The form of these bonds is different in different countries; so is their authority. In some countries they bind the owner or owners; in others not; and, where they do not, though the form of the bond affects to bind the owners, that part is insignificant, but does not at all touch upon the efficiency of those parts which have an acknowledged operation." The instrument with

which the learned lord was dealing was, in form, a bottomry bond, securing maritime interest (*The Nelson*, 1 *Hagg. Adm. R.*, 176).

A British ship, upon which a bottomry bond had been taken, payable on the ship's arrival in England, was sold by the master, as unseaworthy, at public auction, and, with the consent of the British consul at Babia, to a foreigner, who repaired her, changed her name, and sent her to England. There was no evidence of notice of the bond having been given at the sale. The court, notwithstanding, held that the ship was still subject to the bond (*The Catharine*, 1 *Eng. Law and Eq. R.*, 679). But in another case, it appeared that a British ship, being damaged, was repaired at Elsinore, where she arrived on the 18th of October. S. & Co. undertook the management of, and ordered the repairs, and corresponded with the owner of the ship and part-owners of the cargo, but gave no intimation to them or the master of their intention to take a bottomry bond as a security, for many weeks, and only just before the ship sailed. The bond was pronounced against by the court, with costs, on the ground that the repairs were ordered, in the first instance, on personal credit, and that S. & Co. should have given the master and owners immediate notice of their intention to take a bond (*The Wave*, 4 *Eng. Law and Eq. R.*, 589).

A bottomry bond by a master is not valid unless given to enable him to leave a port where she is detained either for necessary repairs or for claims upon her; she having there no funds, nor credit, nor means of getting money (*Gibbs v. The Texas*, *Crabbe's D. C. R.*, 236). And a libel cannot be sustained in the District Court, brought on a bottomry bond executed in a domestic port, for money neither loaned for, nor applied to, the purposes of the voyage (*Knight v. The Attila*, *Crabbe's D. C. R.*, 326).

A bottomry bond on ship, freight and cargo was granted by the master at the port where A., the owner of the cargo and charterer of the ship, resided. Advertisements for the loan on bottomry were published, and A. was aware of those advertisements, of the unseaworthy condition of the ship, and of the fact that his cargo had been laden and unladen while the ship was in the port; but no more direct communication was made to him, nor any application for advances. The English admiralty held that the advertisements were not sufficient notice; and the bond was pronounced

against, so far as its interest was affected (*The Nuova Loanese*, 22 *Eng. Law and Eq. R.*, 623).

The agent of a ship advanced money on a bottomry bond. The bond was admitted, and, on reference to the accounts, it appeared that one large item was on account of relanding damaged flour, and which flour was the property of the agent. Another large item was on account of money advanced to the master, without inquiry as to the necessity of such advance, or seeing to the application of the money. The report of the register, disallowing those items, was objected to; but the court affirmed the report (*The Royal Stuart*, 33 *Eng. Law and Eq. R.*, 602).

A Swedish vessel, bound from a port in Sweden to Hull, in England, was driven, by stress of weather, to put back into another port in Sweden. This took place on the 21st of November, 1848. Ten days afterward the cargo was unladen, and the ship found to be greatly damaged. The repairs were completed and the cargo reloaded. The master at once communicated with the owners of the ship, resident in Sweden, who, being without funds, consented to the master taking up a bottomry bond for payment of the necessary repairs; and the British consul, at the port where the vessel lay, wrote on behalf of the master, and as his agent, to the consignees at Hull, informing them of the damage sustained by the vessel, but made no application for money, nor referred to the necessity of repairs. No answer was made to this letter; and the master, in the month of March, 1847, hypothecated the ship, freight and cargo for the money borrowed for the repairs. The court held that such letter to the consignees was a sufficient notice to authorize the master raising money by bottomry on the cargo. It was declared, however, that, considering the distance between Sweden and England, and the means of communication, it was essential to the validity of the bond, so far as the cargo was concerned, that the master should communicate with the owners of the cargo before resorting to hypothecation of the cargo, as he could have obtained an answer within a period not inconvenient with the exigency of the circumstances of the case. But the notice given on behalf of the captain being held sufficient, the transaction was sustained (*Wilkinson v. Wilson*, 36 *Eng. Law and Eq. R.*, 62).

It has been held by the English courts that fraud, practiced by an owner or a mortgagee of a vessel, which might render the voy-

age illegal, does not invalidate a bottomry bond to a *bona fide* lender (*The Mary Ann, Law Reports, 1 Adm. & Ecc. R.*, 13). And the same court which decided the last mentioned case allowed the holders of a bottomry bond leave to pay prior charges and have a lien therefor on the ship, cargo and freight, on giving an affidavit specifying such charges, which, in that case, were small (*The Fairhaven, Law Reports, 1 Adm. & Ecc. R.*, 67). And the same court made another important decision in respect to the lien of a bottomry bond. The facts of the case were these: A master gave a bottomry bond on ship, freight and cargo, binding himself. The proceeds of the ship, which had been sold, and the freight were not sufficient to pay both the master's claim for wages and disbursements and the bondholder. The ship, freight and cargo were sufficient. The master had no lien on the cargo. The court held, the owner of the cargo opposing, that, there being sufficient to pay the bondholder, the master's claim should have priority over the claim of bondholder, thus marshalling the assets between them (*The Edward Oliver, Law Reports, 1 Adm. & Ecc. R.*, 379).

The Supreme Court of the State of New York has recently held that a bottomry bond is valid, although it includes the personal liability of the master, and that the master, in such a case, is personally liable, on the bond, for the debt secured; but not unless the vessel arrives. There are cases expressing doubts as to the personal liability of the master, but those seem to be cases where the master has attempted to bind the owners, and not himself. The bond, however, must be made payable only after the arrival of the vessel, and must assume the risk of the safety of the vessel before it is payable. It seems, from this case, that the master may bind the freight, as well as the vessel, in such a bond, by express stipulation; but, in the absence of such stipulation, the bond will create no lien on the freight, directly. But the master of a vessel has a lien on the cargo and freight for advances made, or liabilities incurred by him in a foreign port, for the repairs and supplies of the vessel. And where the vessel is not of sufficient value to secure the debt, and the master is not responsible, the creditor is entitled to have this lien of the master enforced for the payment of the debt incurred for repairs. And the court further held that, where the money secured by a bottomry bond is not paid, the lender, on proof of the insufficiency of the vessel as security, and that the pecuniary responsibility of the master is doubtful,

may have an injunction to restrain the owners from collecting the freight of the cargo brought by the vessel on her homeward voyage (*Kelly v. Cushing*, 48 Barb. R., 269; and *vide Lewis v. Hancock*, 11 Mass. R., 72; *The Dowthorpe*, 7 Jurist, 609).

Lord Tenterden, in his well approved work on Shipping, lays down certain rules in respect to the general authority of the master of a ship, which might have been inserted in a previous chapter; but having been omitted there, may be appropriately given in this place. The learned author says: "As the master in general appears to all the world as the agent of the owners in matters relating to the usual employment of the ship, so does he also in matters relating to the means of employing the ship; the business of fitting out, victualing and manning the ship being left wholly to his management in places where the owners do not reside and have no established agent, and, frequently, also in the place of their own residence. His character and situation furnish presumptive evidence of authority from the owner to act for them in these cases, liable indeed to be rebutted by proof that they or some other person for them managed the concern in every particular instance, and that this fact was actually known to a particular creditor, or was of such general notoriety that he cannot be supposed to be, because he ought not to have been, ignorant of it, or that they were, by the terms of the contract, expressly excluded." And in the following page he says: "In order, however, to constitute a demand against the owners, it is necessary that the supplies furnished by the master's order should be *reasonably fit and proper for the occasion*, or that money advanced to him for the purchase of them should, at the time, appear to be *wanting for that purpose*. The contrary in either case would furnish a strong presumption of fraud and collusion on the part of the creditor. The proper mode of ascertaining what is necessary, is to ask what a prudent owner himself would have done had he been present" (*Tenterden on Shipping*, 8th ed., 134, 135; and *vide Webster v. Seekarup*, 4 Barn. & Ald. R., 352).

In respect to the authority of the master to create a lien upon the ship, the Supreme Court of the United States, in December, 1871, decided that supplies furnished to a ship in a foreign port, and necessary to enable her to complete her voyage and actually so used by her, constitute a lien, unless it can be inferred that the master had funds or the owners had credit; a presumption difficult to make where the owner is greatly embarrassed, and is raising

money in the port where the vessel is, by mortgage of other vessels owned by him. It was declared that the lien is of a high character, and, where once to be inferred, is removed only by proof which actually displaces it. And it was held that entries in a journal and in a ledger, charging apparently the owners, rather than the vessel—proof of the form of entry in the day-book not appearing, owing to its being dispensed with by the material-man—were not sufficient to displace the lien (*The Patapsco*, 13 Wall. R., 329; and vide *The Lulu*, 10 ib., 192; *The St. Jago de Cuba*, 9 Wheat. R., 409).

In an important case in the English admiralty it was held that the master has a right to hypothecate the ship and cargo, though lying in a port in the same country in which the owners reside, provided he has no means of communicating with the owners. Sir W. Scott said: "It is true that it is usually required as a condition, necessary to the validity of bonds of this kind, that they should be executed in a foreign port, but the law does not look to the mere locality of the transaction. The validity or invalidity of the bond does not rest on that circumstance only, but upon the extreme difficulty of communication between the master and his owners" (*La Ysabel Bozo*, 1 Dods. Adm. R., 273).

Parke, Baron, in giving his opinion in a case hereinbefore referred to, discussing the subject of the validity of a bottomry bond, says: "We must not be supposed to intimate a doubt that a bottomry bond may not be given at the same time with and as a collateral security for bills of exchange drawn on the owner. This was clearly laid down by Dr. Lushington in the case of *The Emancipation* on the authority of many cases. If necessities can be provided on the personal credit of the owners or on a bill of exchange drawn by the master upon them, a bottomry bond cannot afterward be given to secure the same debt, because the necessity of hypothecating the ship is the condition of the master's authority to do so (*The Augusta*, 1 Dods. Adm. R., 233). But bills of exchange may be drawn on account of the supply, and a bottomry bond given at the same time as a collateral security in this sense, that if the bills of exchange are honored (*The Nelson*, 1 Hagg. Adm. R., 174), that is, accepted and paid, if they require acceptance, or paid if they do not, as the case may be, the bottomry is discharged; and though the ship arrives, the maritime interest is not payable. If dishonored, the amount is payable on arrival by

means of the remedy against the ship; and in that case, with maritime interest (*The Catharine*, 3 *Hagg. Adm. R.*, 257; *The Emancipation*, 1 *W. Rob.*, 129; *The Atlas*, *Id.*, 421). So that, in that event, if the bills are accepted the creditor would have a double remedy; one against the person of the debtor, and one against the ship. But the law forbids the creditor to have a direct remedy on *the bond itself* against the owner as well as the ship; and it makes it essential to the remedy against the ship that it should be contingent on its safe arrival, and this whether maritime interest is required or not" (*Stainbank v. Shepard*, 4 *J. Scotts R.*, 443; *S. C.*, 13 *Common Bench R.*, 443, 444; *S. C.*, 76 *Eng. C. L. R.*, 443).

Some very old cases, of more or less interest, are referred to in Bacon's Abridgment, illustrating certain principles in bottomry transactions. One case was this: The plaintiff entered into a penal bond of bottomry to pay forty pounds per month for fifty pounds; the ship was to go from Holland to the Spanish Islands, and so to return for England; but if she perished, the defendant was to lose his fifty pounds. The ship went accordingly to the Spanish Islands, took in Moors at Africk, and upon that occasion went to Barbadoes, and then perished at sea. The plaintiff being sued on the bond and penalty, sought relief in equity, pretending that the deviation was of necessity; but his bill was dismissed, saving as to the penalty.

Another case was the following: J. S. entered into a bottomry bond, whereby he bound himself, in consideration of £400, as able to perform the voyage within six months, or at the six months' end to pay the £400 and forty pounds premium, in case the vessel arrived safe, and was not lost in the voyage; and it fell out that J. S. never went the voyage, whereby his bond became forfeited, and he preferred a bill to be relieved; and in regard to the ship, she lay all along in the port of London, so that the defendant ran no hazard of losing his principal. The Lord Keeper decreed that he should lose the premium of forty pounds, and be contented with his ordinary interest (3 *Bacon's Ab.*, *tit. Merchant and Merchandise*, 601).

A reference to a few more modern English cases will conclude this chapter, and, essentially, the consideration of the subject of maritime loans.

A vessel chartered by the appellants put into a port in Cuba,

in distress; the master attempted unsuccessfully to raise money; and the agents of the appellants in Cuba then telegraphed to the appellants in Liverpool, who directed that money should be obtained on bottomry. The telegram of the agents contained a direction to the appellants to see the owner, but they did not do so, though the owner was then living in the same town as the appellant. The owner was at the time insolvent. The British Privy Council held, affirming the judgment of the English Admiralty Court, that, under the circumstances, notice to the owner was absolutely necessary to the validity of the bond. Until he has been judicially declared insolvent, the owner is the person to receive notice of the intention to raise money on bottomry, in order to enable him to raise money for rescuing his vessel from her difficulties at a smaller amount of premium than the maritime premium would necessarily entail. In case the owner has been judicially declared insolvent, then the court hold that the ownership in the vessel is transferred to other persons, to whom notice must then be given (*The Panama*, 23 L. T. R., N. S., 12; and vide 2 *Albany Law Journal*, 258).

A master, being in want of funds and credit in a foreign port, executed an agreement with certain parties for advances to be made to him. This agreement contained the following conditions: That the master should draw a bill of exchange to cover such advances upon the consignees of the ship at the port to which he was proceeding; that, within thirty-five days after his arrival at such port, he should discharge and pay such bill of exchange and all interest which might have become due upon it, together with the money paid by way of premium for effecting an insurance of the vessel during the intended voyage, and until the vessel had taken her departure from the port to which she was proceeding on a further outward voyage, as also interest on all such money as last aforesaid at the rate of nine pounds per cent per annum from the time of payment up to the time of such repayment; and, for securing the repayment of all such sums and interest, the master bound, pledged, mortgaged and hypothecated the ship, with her tackle and appurtenances. The English Court of Admiralty held that such an agreement was not an instrument which can be enforced in a court of admiralty; and, further, decided that the instrument was not a bottomry bond, for there was no maritime risk, an ingredient essential to its vitality (*The Indomitable*, 5 Jur., N. S., 632; S. C., *Swabey's R.*, 446).

Where it appeared that at a foreign port, at which the master had taken in necessary supplies, the owner of the vessel had a recognized agent within the possible and probable knowledge of the person making the advance, the Court of Admiralty of England held that the bottomry bond given for such advance was void (*The Faithful*, 31 *L. J. Adm.*, 81). And the same court held in a subsequent case that the master, before giving a bottomry bond on ship, freight and cargo, is bound, as against owners of cargo, to communicate both with the owners of the ship and the shippers or consignees of the cargo, when such communication is, under all the circumstances, reasonably practicable; but not otherwise (*The Olivia*, *Lush. R.*, 484; *S. C.*, 31 *L. J. Adm.*, 137). And in still a later case the same court held that it is as much the duty of a master to give or attempt to give notice to the owners of a cargo as to the owners of the ship before executing a bottomry bond (*The Karnak*, 37 *L. J. Adm.*, 41; and *vide The Hamburg*, 9 *Jur.*, *N. S.*, 440; *S. C.*, 32 *L. J. Adm.*, 161).

In the last case referred to, it was held that the validity of a bottomry bond taken in a foreign port upon a foreign ship, freight and cargo, the owners of the cargo being English, and the ship and cargo being proceeded against in England, is to be governed by the general maritime law, and not by the *lex loci contractus*, or the law of the country to which the vessel belongs (*The Hamburg*, 2 *Moore's P. C. C., N. S.*, 289; *S. C.*, 33 *L. J. Adm.*, 116).

It can hardly be necessary to pursue the subject further; and with some extracts from the celebrated Digests and Code of Justinian, and the equally celebrated French ordinance of Louis XIV, concerning the Marine, the whole discussion of the law relating to Maritime Loans will be concluded.

CHAPTER LXIV.

TRANSLATION OF THE SECOND TITLE OF THE TWENTY-SECOND BOOK OF THE DIGESTS, AND OF THE TWENTY-THIRD TITLE OF THE FOURTH BOOK OF THE CODE, EACH ENTITLED DE NAUTICO FOENORE—TRANSLATION OF THE FIFTH TITLE OF THE THIRD BOOK OF THE FRENCH ORDINANCE CONCERNING THE MARINE.

THE provisions of the Digest entitled "Of Maritime Loan" are substantially as follows :

LAW I. What is called *maritime money* is money which is carried beyond the sea; if it should be consumed in the same place it will not be *maritime*. But it is to be considered whether the merchandise purchased with that money has been purchased with that view. And it is material that it should be carried at the peril of the creditor. Then the money becomes *maritime*.

LAW II. *Labeo* says: If there is nobody on the part of the borrower on whom process can be served to compel him to pay the maritime money, the fact must be proved by testimony, and it will be equivalent to a legal demand.

LAW III. In a maritime loan, the lender undertakes the risk from the day that the vessel is appointed to sail.

LAW IV. It matters not whether the maritime money may have been taken without being at the risk of the lender, or whether it ceased to be at the risk of the creditor after the expiration of the term or performance of the condition. In either of these cases no more than the common legal interest shall be due; and never in the first case, nor in the second, from the time that the risk ceases, shall goods pledged or hypothecated be retained for a higher interest.

§ 1. The daily reward of a servant, sent for the purpose of recovering the maritime money, shall not exceed double the lawful interest of one per cent a month. If the stipulation of interest to be paid after the risk expires does not amount to the whole legal interest, it may be supplied by another stipulation for the servant's labor.

LAW V. The price or compensation of risk is whatever is given over and above the money received on a penal condition not actually existing, provided the contract is not of a gaming or wagering species, from which the condition is to arise, as, *if you manumit, you do not do such a thing, if I shall not recover from sickness,*

etc. But there is no doubt, where money is lent to a fisherman to purchase fishing tackle, to be repaid *in case he shall catch fish*, or to a prize fighter to fit himself for the combat, to be repaid *in case he shall come off conqueror*.

§ 1. But in all these cases a single contract, without a stipulation, is sufficient to sanction the obligation.

LAW VI. A person having lent money at maritime risk has taken in pledge some goods shipped on board of the vessel. And, further, in case there should not be sufficient to satisfy the whole debt, other goods, shipped on board of other vessels already pignored to other lenders, are pledged to him, in case there should be any residue. It is now asked whether, if the ship out of which he was to have been paid the whole be lost, it is to the damage of the lender, or whether he has yet a recourse on the residue of what was shipped on other vessels? I answer: in general, the diminution of the pledge is to the damage of the debtor and not of the creditor. But where maritime money is thus given, *the lender has no right to demand his money*; unless the vessel arrives in safety at the stipulated time, the obligation of the debt is extinguished by the non-existence of the condition, and, therefore, the lien on the pledge is also gone, even on those that are not lost. If the vessel is lost within the time fixed for the end of the risk, the condition of the stipulation is extinguished; therefore, there is no ground for prosecuting a lien on the pledges that were shipped on board of other vessels. At what time, then, is the creditor to be admitted to prosecute such liens? Only when the condition of the obligation is actually in existence, and in case the pledge should be lost by another accident, or should sell for less than the amount of the money due, or if the vessel should be lost after the time when she ceases to be at the risk of the lender.

LAW VII. Maritime interest is due on certain contracts agreeable to the stipulation. For, if I lend ten pieces on the condition that *if the ship arrives safely I shall receive the principal with a certain interest*, then I may receive the principal with the interest stipulated.

LAW VIII. Servius says that the penalty of a marine loan cannot be demanded if the creditor had it in his power to receive his money within the limited time.

LAW IX. If the penalty of a maritime loan has been stipulated

for in the usual manner, although on the day of payment nobody should be alive that might be said to owe the money, yet the penalty is forfeited in the same manner as if the debtor had left an heir.

The provisions of the Code of Justinian upon the same subject are substantially as follows :

LAW I. It is clear that maritime money, lent at the risk of the creditor, bears an interest different from that of the legal rate, only until the arrival of the vessel at the port of its destination.

LAW II. If you say that you have lent money on condition *that it should be returned to you in the Holy City*, and if you do not declare that you undertook the certain dangers of the seas, there is no doubt that you cannot recover any more than common legal interest for money so lent.

LAW III. If you declare to have lent money at maritime interest on this condition, *that you should be paid after the arrival at Salo of a vessel which the debtor represented to be bound to Africa*, so that you only undertook the risk of the voyage to Africa; and by the fault of the debtor the ship was seized for contraband goods on board of her, the reason of the law will not permit that the damage of the loss of the goods, which happened not by the stress of weather, but by the greedy avarice and insolent behavior of the debtor, should fall upon you.

LAW IV. But the loss of maritime money, lent at the peril of the debtor, before the vessel reaches the place of her destination, must not fall upon the debtor. Otherwise, without an agreement of this kind, the debtor should not be freed from his engagement, even by the misfortune of shipwreck.

EXTRACT.—EX JULIO PAULO.

Maritime money, in consideration of the risk which the lender runs, may, while the vessel is at sea, have an indefinite interest.

The provisions of the French ordinance concerning the marine, entitled *Des Contrats à la grosse Adventure ou à retour de voyage*, are as follows :

ARTICLE I. All contracts of *maritime loan*, otherwise called of *gross adventure*, or of *return voyage*, may be made either by a public notary or under a private signature.

ARTICLE II. Money may be given upon the body and keel of the ship, and upon her rigging, tackle, provisions and outfits, jointly

or separately, and upon all and any part of her lading, for one whole voyage or for a time limited.

ARTICLE III. We forbid all persons to take up, at maritime risk, upon their ships or goods on board thereof, more than their real value, under pain of being obliged, in case of fraud, to pay the whole sums, notwithstanding the vessel should be lost or taken.

ARTICLE IV. We also forbid them, under the like penalty, to take up any money upon the freight for the voyage to be made, or upon the profit expected on the lading, or even upon the seamen's wages, except it be in the presence and with the consent of the master, and under one-half of the aforesaid wages.

ARTICLE V. We moreover forbid all persons to advance any money to seamen at maritime risk upon their wages and voyages, except it be in the presence and with the consent of the master, under pain of confiscation of the sums lent, and a fine of fifty livres.

ARTICLE VI. The masters shall be answerable, in their own names, for the whole amount of the sums taken up by the seamen with their consent, if they shall exceed one-half of their wages, and that notwithstanding the loss or capture of the ship.

ARTICLE VII. The ship, her rigging, tackle, apparel and provisions, and even the freight, shall be, by privilege, affected for the payment of the principal and interest of money given upon the body and keel of the ship for the necessities of the voyage, and the lading shall be bound for the money borrowed to procure the same.

ARTICLE VIII. Such as give money upon bottomry to a master without the consent of the owners, if they live in the place, shall have no security nor privilege upon the ship, any further than the part that the master may have in the ship and freight, though the money was borrowed for fitting out the ship or for buying provisions.

ARTICLE IX. However, the parts of such of the owners as refuse to furnish their proportions for fitting out the vessel shall be affected for the money lent to the master for the equipment and provisions of the ship.

ARTICLE X. Creditors for money formerly due on such things, and left outstanding by renewal or continuation of the contract, shall not come in competition with those that have actually lent for the last voyage.

ARTICLE XI. All contracts of maritime loan shall be void after the entire loss of the effects upon which the money was lent, if that happened by accident, and within the times and places therein expressed.

ARTICLE XII. Nothing shall be reported *accident* that is occasioned by the internal defect of the things themselves, or by the fault of the owners, master or merchant, except it be otherwise provided by the contract.

ARTICLE XIII. If the time of the risk be not specified by the contract, it shall last, as to the ship, her rigging, tackle and provisions, from the day she sets sail until she arrives at her intended port and is moored at the wharf; and as to the goods, it shall last from the moment they are laden on board the ship, or lighter to be carried thither, until they are unladen or carried on shore.

ARTICLE XIV. A person lading goods, and taking up money upon them at maritime risk, shall not be acquitted by the loss of the ship and lading, unless he makes it appear that he had then on his own account effects to the value of the sum borrowed.

ARTICLE XV. However, if the person that has taken money at maritime risk make it appear that he could not ship goods to the value of the sum borrowed, the contract, in case of loss, shall be diminished in proportion to the value of the effects laden, and shall only subsist on the overplus; upon which the owner shall pay the interest, according to the contract rate of the place where the contract is made, until the actual payment of the principal. And if the ship arrive in safety, there shall be due only the legal interest, and not the maritime profit of the overplus of the effects put on board.

ARTICLE XVI. Those that give money at maritime risk shall contribute, in discharge of the borrower, to general average, such as ransoms, compositions, jettisons, masts and ropes cut away for the common safety of the ship and goods; but not for simple average or particular damages that may happen, except there be some agreement to the contrary.

ARTICLE XVII. However, in case of shipwreck, the contract of maritime loan shall be reduced to the value of the effects that are saved.

ARTICLE XVIII. If there be a contract of maritime loan and an insurance upon the same cargo, the lender shall be preferred to the

insurers, upon the effects preserved from shipwreck, for his capital, and no further.

Such are substantially the provisions of the pertinent title of the Digest, the Code of Justinian, and the famous ordinance of Louis XIV of France, upon the subject of Maritime Loans, and they are regarded of sufficient importance to be inserted in this place. The Code of Justinian is a digest of the usages and legislation of many centuries, and is really the great monument of the reign of the Byzantine Emperor. The work of compiling the Roman law, embodied in this Code, was entrusted to seventeen commissioners, of whom Tribonian was the head. The work was finished about A. D. 533. The compilation consisted of extracts from all the writers who were regarded as of any authority, and the entire Code was published in fifty books, and altogether formed the body of the Roman law, and now known as the civil law. Although this Code, soon after its first publication, fell into neglect and even oblivion, about the year 1130 it suddenly grew into vogue and authority, and was introduced into several nations, since which it has occasioned a mighty inundation of voluminous comments, and is everywhere consulted as a precedent for legislation, and considered by the courts as an authority of more or less weight. In some countries of Europe, the civil law is at present cultivated with great success, and it is, in some cases, formally recognized as competent authority. In England and in this country this Code has never been adopted, as such, and it has been less inter-fused with the system of laws which has grown up in these countries than in most countries of Europe, and yet the principles of the Roman law are often referred to by eminent English and American judges and writers, and the decisions of our courts are often influenced by reason of such recognition and reference; and more especially are the Admiralty Courts of these countries governed by the principles of modern civil law, that is, by the usages of modern nations in the more extended relations growing out of commercial enterprise, but still having as a basis the rules of the Roman law, so far as applicable. Hence the convenience of having the provisions of the Justinian Code, relating to maritime loans, at hand when the subject is examined.

And in respect to the marine ordinances of the French king, Louis XIV, it may be said that they are even more important than the Code of Justinian. The civilians and lawyers, of every

period since their promulgation, have avowed the greatest admiration of their wisdom and justice. They form a part of the present Maritime Code of Europe, and are acknowledged as authority by all; at least, they have obtained the respect of every maritime State. In this country, it has been judicially declared that these ordinances and the commentaries on them have been received with great respect in the courts of England and the United States; not as conveying any authority in themselves, but as evidence of the general marine law. Where they are contradicted by judicial decisions in our own country, they, of course, are not to be regarded; but, on points which have not been decided, they are worthy of great consideration, and are so regarded by our courts. No apology is, therefore, necessary for their insertion in this place; and with them the discussion of the subject of maritime loans may be closed, and the consideration of the entire subjects of this treatise appropriately concluded.

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